Detroit Newspaper Agency, d/b/a Detroit Newspapers, The Detroit News, Inc., and The Detroit Free Press, Inc. and Detroit Typographical Union No. 18, Communications Workers of America, AFL-CIO and Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO; GCIU Local Union No. 13N, Graphic Communications International Union, AFL-CIO; GCIU Local Union No. 289, Graphic Communications International Union, AFL-CIO; Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL-CIO and CWA/ITU Negotiated Pension Plan. Cases 7– CA-37361, 7-CA-37417, 7-CA-37427, 7-CA-37606, 7-CA-37385, 7-CA-37783, 7-CA-38185, 7-CA-38442, and 7-CA-38184¹

August 27, 1998

DECISION AND ORDER

By Chairman Gould and Members Fox, Liebman, Hurtgen, and Brame

This case presents several unfair labor practice issues arising from 1995 collective-bargaining negotiations, and an accompanying strike, involving the three Respondents and the six Charging Party Unions that separately represent bargaining units of the Respondents' employees. On June 19, 1997, Administrative Law Judge Thomas R. Wilks issued the attached decision. The judge found that Respondent Detroit Newspapers (DNA) violated Section 8(a)(5) by failing to adhere to an agreement with the six Unions, collectively known as the Metropolitan Council of Newspaper Unions (the Council), to bargain jointly about certain issues subsequent to the completion of bilateral single-unit negotiations. He found that Respondent DNA did not violate Section 8(a)(5) by unilaterally implementing a work assignment proposal after reaching a bargaining impasse in negotiations with Detroit Typographical Union No. 18 (Local 18). The judge further found that Respondent Detroit News (the News) violated Section 8(a)(5) during negotiations with Newspaper Guild of Detroit, Local 22 (the Guild), by unilaterally implementing its proposals for merit pay and the assignment of unit personnel for television appearances and by failing to provide certain information requested by the Guild concerning the News' merit pay and overtime exemption bargaining proposals.

The judge found that the aforementioned unfair labor practices were a cause of the strike begun by the Unions among the Respondents' employees on July 13, 1995. Consequently, the judge found that Respondents DNA, News, and Detroit Free Press violated Section 8(a)(5) by threatening unfair labor practice strikers with permanent replacement. He also found that the three Respondents violated Section 8(a)(5) by failing to provide the Unions with certain requested information about strike replacements. He found no violation, however, for the Respondents' unilateral determination of wages and benefits for strike replacements that were different from those received by the striking employees whom they replaced.

In response to the judge's decision, the Respondents filed exceptions and a supporting brief; the General Counsel, Charging Party Unions, and the Guild filed answering briefs; and the Respondents filed a reply brief. The General Counsel and Charging Party Unions separately filed cross-exceptions and a supporting brief; the Respondents filed an answering brief; and the General Counsel and the Charging Parties filed reply briefs.

The Charging Parties also moved the Board to sever and consider separately complaint paragraphs 48, 49, and 50, arising from the charge filed in Case 7–CA–38184 and relating to the issue whether the Respondents unlawfully failed to bargain about the terms and conditions of employment for strike replacements. The Respondents filed an opposition to the motion to sever. The Charging Parties filed a reply to the opposition.

On October 17, 1997, the Board reserved this motion for further consideration and decision. Having further reviewed the matter, the Board has decided to grant the motion to sever and to address the unfair labor practice issue raised in paragraphs 48, 49, and 50 separately from all others raised in this consolidated proceeding.²

In regard to the remaining allegations, the Board has reviewed the judge's decision and the record in light of the exceptions and briefs³ and has decided to affirm the judge's rulings, findings,⁴ and conclusions,⁵ to the extent

¹ We change the caption from "Detroit Newspapers, f/k/a Detroit Newspapers Agency," pursuant to the posthearing contentions of the Respondents and the General Counsel in Cases 7–CA–39522 and 7–CA–39595 (326 NLRB No. 65 (1998)), issued the same day as this decision.

² Chairman Gould dissents from the Board's decision to sever this issue and has in a separate opinion attached to this Decision and Order set forth his reasons for doing so.

³ On September 4, 1997, the Respondents filed a motion to recuse Chairman Gould from participating in this proceeding. By unpublished Order dated September 5, 1997, the Chairman denied the motion. His reasons for denying the motion are set forth in his separate opinion attached to this Decision and Order.

All parties filed motions requesting the Board to expedite issuance of a decision in this case. By unpublished Order dated October 17, 1997, the Board denied the Respondents' request for a specific deadline date for issuance but recognized the need for expeditious processing of the case, consistent with adequate consideration of the issues raised.

⁴ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

consistent with this Decision, and to adopt his recommended Order, as modified and set forth in full below.

I.

Respondent DNA is the employing entity responsible for the nonnews, noneditorial publishing, and circulation operations of both Respondent News and Respondent Free Press. Each of the six Charging Party Unions in the Metropolitan Council of Newspaper Unions (the Council) represents separate bargaining units of Respondent DNA's employees. Six other unions, not directly involved in this proceeding, represent separate units of skilled trades employees. There are separate collective-bargaining agreements for each unit.

During contract negotiations in 1992, DNA initially rejected a Council proposal to engage in joint bargaining about economic issues common to all units. In mid-April, after a breakdown in negotiations with Teamsters Local 372, DNA changed its position and agreed to a two-stage format for continued bargaining. Under the agreement, DNA first bargained bilaterally with each individual union over "noneconomic" unit issues. (Although characterized as "noneconomic," these issues include wage adjustments given by DNA as the quid pro quo for a union's concession on other matters.) After the resolution of these issues, the Council unions then bargained jointly with DNA on "economic" issues common to all units, such as across-the-board increases in compensation. Utilizing this format, the parties concluded both negotiating phases and reached new collectivebargaining agreements for all units within a week of the April 30 expiration date for the old agreements.

The individual contracts negotiated in 1992 were set to expire on April 30, 1995. Once again, DNA rejected the Council's initial requests for a two-stage bargaining procedure that would reserve for joint bargaining some issues common to all units. Consequently, bargaining on all issues commenced on the established single-employer, single-unit basis.

Negotiations progressed slowly for the Council units. The parties agreed to extend the old contracts on a day-to-day basis beyond April 30. On May 9, DNA President Frank Vega orally agreed with Albert Derey, the Council unions' chief negotiator, that the parties would engage in joint bargaining after tentative agreements had been reached on individual unit contract issues and that certain issues would be reserved for the joint bargaining stage.

A May 9 letter, from Derey to Vega confirmed the Council's willingness to engage in joint bargaining. Derey's letter stated his belief "that the above would serve to get the negotiations off the dime and headed in the right direction." A May 11 letter, from Derey to

Vega identified the 13 specific issues to be discussed in joint bargaining. The reserved issues were wage increases, COLAS, health insurance, duration of the agreement, vacation, holidays, life insurance, bereavement, adoption assistance plan, military leave, classified ad discount, 401(k) savings plan, and stock options.

Unlike the case in 1992, the two-stage bargaining agreement did not lead to a relatively quick resolution of all negotiations. As individual unit discussions dragged into June, DNA's negotiators began to press for a conclusion to individual bargaining. They warned that certain proposals would be withdrawn if negotiations continued past June 30. Some of these proposals included provisions for retroactive wage increases. Prior to June 15, no union representative protested these references to economic issues that had ostensibly been reserved for second-stage joint bargaining.

On June 12, the Council requested a letter documenting DNA's oral agreement to the two-stage bargaining format. DNA responded with a June 14 letter stating that it would "continue to deal on economic issues individually with each union . . [h]owever, if we can finish all non-economics in sufficient time prior to June 30, we will meet jointly." In subsequent individual unit bargaining sessions, DNA's negotiators repeated references to a June 30 deadline, implied that they might not reach the joint bargaining stage, and made proposals on "reserved issues" or for complete contracts. The Unions disputed DNA's claim that these actions were consistent with the parties' oral agreement to a two-stage bargaining format.

The contracts expired on June 30. On July 7, DNA met in joint session with the Council and agreed to around-the-clock individual negotiations. If successful, the parties would then have engaged in joint economic bargaining. Individual bargaining on July 10–12, failed to produce agreement for any unit. The Unions struck on July 13.

The General Counsel has alleged that DNA violated Section 8(a)(5) by breaching the two-stage bargaining agreement. Much of this dispute centers on factual issues. In credibility resolutions, the judge discredited testimony by DNA's negotiators that they conditioned their agreement to a second, joint bargaining stage on progress in the initial, single-unit bilateral negotiation stage. Accordingly, the judge found that the agreement for a two-stage bargaining procedure was unconditional. The judge further found, again based on his credibility resolutions, that DNA breached this agreement by imposing three new conditions: (1) joint bargaining was contingent on progress in individual bargaining; (2) joint bargaining was contingent on tentative agreement in all individual bargaining by June 30; and (3) DNA could engage in individual bargaining on issues previously reserved for joint bargaining.

There remained the legal question of whether DNA's breach of an agreement to reserve certain issues for joint

⁵ There are no exceptions to the judge's conclusion that Respondent News' managing editor violated Sec. 8(a)(1) of the Act by removing Guild materials from a bulletin board reserved for Guild use and from editorial unit employees' mailboxes.

bargaining violated Section 8(a)(5) of the Act. The judge concluded that it did. He agreed with the General Counsel that *Boston Edison Co.*, 290 NLRB 549 (1988), extended the principles of *Retail Associates*, *Inc.*, 120 NLRB 388 (1958), to a single employer's agreement to engage in multiunion joint bargaining on one or more particular bargaining subjects. The judge found that DNA's attempt to modify or withdraw from joint bargaining during the antecedent single-unit bargaining stage was untimely and unlawful under *Retail Associates*.

DNA contends in exceptions that it did not give clear and unequivocal consent to the two-stage bargaining agreement, as defined by the judge, and that it did not breach the conditional joint bargaining agreement to which, it argues, it did commit itself. This argument turns essentially on challenges to the judge's credibility resolutions. As previously stated, we find no basis for reversing the judge's credibility findings.

DNA further suggests, however, that the principles of Retail Associates should not apply to the circumstances of this case. We agree with this proposition. As explained below, in our view, a refusal to carry out an ad hoc agreement to meet on a group basis to consider certain common issues, struck in midcourse of multiple single-union, single-employer negotiations, raises different concerns from those presented in the case of withdrawal from multiemployer or multiunion bargaining where the parties have unequivocally agreed in advance of bargaining that all will be bound by group rather than by individual action. We therefore conclude that, although there may be circumstances in which reneging on such an agreement could be found to constitute bad-faith bargaining, in violation of Sec. 8(a)(5), the General Counsel has failed to establish that the actions of DNA at issue here were taken in bad faith.

The rules concerning withdrawal from group bargaining which are set forth in *Retail Associates* are part of a set of bargaining ground rules which the Board initially developed in order to "further the utility of multiem-

ployer bargaining as an instrument of labor peace." Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404, 412 (1982). Because the utility of multiemployer bargaining would be significantly diminished if parties were free to come and go at will from the multiemployer unit, these rules require that in order to establish the multiemployer unit, there must be an unequivocal commitment by each member of the employer group to be bound by the results of group rather than individual action, the union representing their employees must have been notified of the formation of the group and the delegation of bargaining authority to it, and the union must have assented and entered into negotiations with the group's representatives. See Bonanno Linen Service, 454 U.S. at 419-420 (Stevens, J. concurring), citing Weyerhaeuser Co., 166 NLRB 299 (1967), enfd. 398 F.2d 770 (D.C. Cir. 1968). Conversely, in order for an employer or a union to withdraw from a multiemployer unit, the party seeking to withdraw must give unequivocal written notice of withdrawal prior to the date set by the contract for modification or the agreed-upon date to begin multiemployer negotiations. Retail Associates, supra at 395. Once bargaining has begun, withdrawal can be effected only by mutual consent or when "unusual circumstances" are present. Id. This precludes a party from withdrawing from the multiemployer unit because it is dissatisfied with the results of group bargaining or has otherwise decided midnegotiations that it is no longer to its advantage to be part of the group.

In cases decided since Retail Associates, the Board has applied the standards for withdrawal from multiemployer bargaining to withdrawal from multiunion bargaining arrangements. See, e.g., Consolidated Papers, Inc., 220 NLRB 1281, 1282-1283 and fn. 2 (1975); Boston Edison, supra. However, it has done so only where—as in the multiemployer bargaining situation—the parties have unequivocally manifested an intent to be bound by the results of the group negotiation. Thus, the Board has held that, in multiunion as well as multiemployer bargaining, a party that has not made such a commitment is free to withdraw from group negotiations at any time and is not bound to any agreement reached through the group bargaining. Plumbers Local 525, 171 NLRB 1607, 1610 (1968); Bonanno Linen Service, supra at 420 (Stevens, J. concurring).

Here there is no evidence that before the commencement of the 1995 negotiations there was unequivocal agreement by all the parties to the bargaining to be bound by group action. Further, no party contends that the mutual consent to a two-stage bargaining procedure during negotiations in either 1992 or 1995 changed that fundamental situation. Since there was no agreement to an arrangement whereby the parties would be bound by the results of group negotiations, there is no reason to impose *Retail Associates'* stringent requirements for withdrawal from such an arrangement. Thus, if we are to find

⁶ In *Retail Associates*, the Board announced, pursuant to the statutory purpose of encouraging labor relations stability, that it would:

refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other absent unusual circumstances. [120 NLRB at 395.]

In *Boston Edison*, supra, the Board applied the *Retail Associates* rule to an established joint bargaining relationship on a single bargaining subject, a pension plan common to three separately represented units of the employer's employees and negotiated apart from the general collective-bargaining agreements for those units. The Board found that one of the three union representatives timely withdrew prior to the commencement of joint bargaining on the pension plan. The respondent employer therefore violated Sec. 8(a)(5) by refusing to negotiate separately with this union.

DNA's breach of its agreement to engage in limited group bargaining to be unlawful, we must do so on the basis of considerations other than those that underlie the decisions in *Retail Associates* and *Boston Edison*.⁷

A change in relative bargaining power cannot be the alternative basis for our enforcement of the two-stage bargaining agreement. It may well be, as the judge observed, that certain individual unions faced a "loss of bargaining impact" if DNA renounced joint bargaining. The Supreme Court has clearly stated, however, that "our labor policy . . . [does not] contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 490 (1960). See also *Evening News Assn.*, 154 NLRB 1494, 1497 (1965), affd. sub nom. *Detroit Newspaper Publishers Assn.* v. *NLRB*, 372 F.2d 569 (6th Cir. 1967).

Still, the Board has an obligation "to protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment." Sea Bay Manor Home for Adults, 253 NLRB 739, 741 (1980). The Board has met this obligation by enforcing, through Section 8(a)(5), parties' agreements on ground rules for their negotiations. See, e.g., American Protective Services, 319 NLRB 902, 905 (1995), enf. denied 113 F.3d 504 (4th Cir. 1997) (agreement to submit employer's final offer to binding employee ratification vote); Natico, Inc., 302 NLRB 668 (agreement to implement an incentive wage proposal for a trial period in order to enable both parties to determine whether it should be included in the collective-bargaining agreement). In each of the cited cases, however, the Board found that the party's breach of ground rules was inconsistent with the general statutory obligation to bargain in good faith.8

"A statutory standard such as 'good faith' can have meaning only in the application to the particular facts of a particular case." *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 410 (1952). Consequently, the Board reviews the entire course of challenged conduct to see if it reveals a purpose to delay and frustrate bargaining. The evidence does not show such a purpose in DNA's conduct here.

DNA's agreement to resort to two-stage bargaining in 1995 did not work as it had in 1992, when the parties completed their negotiations within 3 weeks of DNA's acceptance of the two-stage process. In 1995, the negotiations bogged down in the first bargaining stage. Even accepting the judge's credibility-based determination that the agreement to reserve numerous issues for second stage joint bargaining was not expressly contingent on the overall pace of negotiations, we cannot altogether ignore the fact that a major goal of the ground rules agreement, struck during a side bar discussion among three of the principals, was, as stated in the Unions' own May 9 letter confirming the agreement, "to get the negotiations off the dime and headed in the right direction." By mid-June, DNA negotiators reasonably believed that this goal was not being met. 9 So they then pursued alternative bargaining tactics with the same goal in mind. 10

does not violate the statutory obligation to bargain in good faith. However, he does not rely on the holdings in the above-cited cases for that proposition. Member Brame took no part in the consideration of those cases, and expresses no view as to their correctness.

⁹ The lack of progress also had substantial economic ramifications for DNA. Its bargaining proposals contemplated operational changes and the elimination of about 150 jobs. DNA estimated that each additional week of negotiations meant a loss of \$150,000 in potential cost savings from its proposals. In individual bargaining sessions after June 1, DNA negotiators warned that they would begin withdrawing certain other proposals, including proposals for retroactive wage increases, if negotiations continued past June 30. DNA's imposition of time constraints on the two-stage bargaining agreement, and its attempts to bargain about reserved issues during individual bargaining sessions after June 15, were consistent with these other economics-driven bargaining actions, which the General Counsel does not challenge as unlawful, bad-faith conduct.

10 Contrary to Member Liebman's dissent, we believe that the Board best preserves the process of collective bargaining by forbearing from intervening in it in the absence of party conduct inconsistent with 8(d)'s obligation to bargain in good faith. In the absence of such behavior, the Board should properly leave the parties to their own devices and allow them to formulate their own procedures and structures to facilitate coming to an agreement. As such, we do not find that Respondent DNA's retreat from two-stage bargaining in this instance indicated bad faith. We find that Respondent DNA agreed to the temporary expedient of two-stage bargaining in order to move negotiations forward. And, when, in its view, the technique did not work, the Respondent returned to bargaining on all topics with the goal of reaching agreement

While it is obvious that the communication between the parties deteriorated during this period, we do not find that the Respondent DNA's actions amounted to an attempt to frustrate the bargaining process and prevent the attainment of a collective-bargaining agreement. Consequently, we do not agree with Member Liebman that Respondent DNA's conduct in regard to its repudiation of two-stage bargaining constituted a refusal to bargain in good faith.

⁷ We disagree with Member Liebman's view that the circumstances of the 1989 and 1992 negotiations between the parties demonstrate an established practice of group bargaining. It is true that in both sets of negotiations, the unions bargained as a group over certain issues. But this does not establish a default practice of group bargaining. To the contrary, the fact that both the 1992 and 1995 negotiations commenced on an individual union basis indicates that the default procedure for these parties was individual union bargaining.

We note, moreover, that in the 1989 negotiations, although group bargaining did occur, one union subsequently withdrew from the group negotiations and negotiated a separate, complete contract with the DNA. It was this separately negotiated package which was then presented to the remaining unions and on which an agreement was ultimately reached, with minor modification. This history reinforces our view that there has been no unequivocal manifestation by the parties of an intent to be bound by the results of group bargaining and that ad hoc agreements by the parties to establish, as ground rules for negotiations, that bargaining over certain issues would occur on a group basis were subject to modification or repudiation, as needed, to facilitate bargaining

ing.

8 Member Brame agrees with the majority that the principles articulated in *Retail Associates* have no application to the circumstances of this case. He further agrees with the general proposition, discussed above, that a party's breach of agreed-upon ground rules, without more,

Furthermore, we should not lightly infer an irrevocable commitment to the two-stage bargaining ground rules, because such an agreement, although permissible, would have the practical effect of reserving most major economic issues for the second stage of bargaining. As the Second Circuit recognized in *NLRB* v. *Patent Trader, Inc.*, 415 F.2d 190, 197–198 (1969):

[P]ostponing or removing from the area of bargaining—to the very end of negotiations—most fundamental terms and conditions of employment . . . reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises" with the result of ". . . rigidly and unreasonably fragmenting the negotiations. . . ." See *Vanderbilt Products, Inc.* v. *NLRB*, 297 F.2d 833 (2d Cir. 1961) (Per Curiam).

In general, "[s]uccessful collective bargaining requires flexibility." Olin Corp., 248 NLRB 1137, 1141 (1980). Even when, as here, parties consent to a two-stage bargaining ground rules agreement with the aim of facilitating the completion of collective-bargaining negotiations, adherence to such an agreement may prove to have the opposite effect. Indeed, the Board and courts have repeatedly found that an employer violates Section 8(a)(5) of the Act by insisting indefinitely on the resolution of all noneconomic issues before negotiating economic issues. See John Wanamaker Philadelphia, 279 NLRB 1034 (1986); South Shore Hospital, 245 NLRB 848, 857–860 (1979), enfd. 630 F.2d 40 (1st Cir. 1980); Adrian Daily Telegram, 214 NLRB 1103, 1110-1112 (1974), Federal-Mogul Corp., 212 NLRB 950 (1974), enfd. 524 F.2d 37 (6th Cir. 1975). In Adrian Daily Telegram, the Board found violations in spite of the fact that the unions involved in bargaining had initially agreed, without time limitation, to ground rules setting a noneconomic, economic order for negotiations. In Federal-Mogul, the union did not expressly agree to negotiate noneconomic issues first. However, after the employer insisted on imposing ground rules in bargaining, which ground rules included negotiating noneconomic issues first, the union engaged in noneconomic bargaining for many months before pursuing economic issues.

We do not suggest that the Unions' insistence on adherence to the two-stage bargaining procedure was unlawful here. We cannot conclude, however, in light of the above precedent, that DNA was indefinitely precluded, absent the Unions' consent, from attempting to negotiate, in the ongoing individual union negotiations, about the numerous major substantive bargaining issues that had at some interim point during negotiations been reserved for joint bargaining. Under the circumstances, DNA's departure from the ground rules represented a good-faith attempt to accelerate, not delay, the bargaining process and to achieve, not frustrate, the completion of collective-bargaining agreements. We therefore find

that DNA did not violate Section 8(a)(5) of the Act by virtue of its above-described conduct.¹¹

П

A critical issue in individual bargaining between the Respondent DNA and DTU Local 18 was the Employer's proposal to permit the assignment to nonunit employees of certain work that unit employees had traditionally performed. After several bargaining sessions, the parties reached impasse on this issue and DNA implemented its proposal. The judge found that this action did not violate Section 8(a)(5).

There are no exceptions to the judge's finding, in reliance on *Antelope Valley Press*, 311 NLRB 459 (1993), that that proposal, referring to "jurisdiction descriptions," was in fact a work assignment proposal which did not alter the scope of the bargaining unit and that it therefore involved a mandatory subject of bargaining. Both the General Counsel and Charging Party Unions contend in exceptions, however, that the judge erred by failing to find that the proposal entailed a midterm modification of a longstanding memorandum of agreement and therefore could not be implemented without Local 18's consent. We agree with the judge that DNA did not act unlawfully, but we do not rely on his reasoning.

In 1975, the News and Free Press each entered into a Memorandum of Understanding (MOA) with the DTU granting certain named printers lifetime job guarantees in exchange for ending the existing practice of reproduction or "reset" of work. DNA adopted the MOA in 1982. Section 10(a) of the MOA, entitled "Work Arrangements," described "the work arrangements of the ITU employee involving the use of scanners and VDT terminals when such equipment is performing composing room work within the jurisdiction of the Union." Section 11 of the MOU states that it "shall be ongoing and part of all future collective bargaining agreements and shall not be subject to amendment except by mutual consent of the parties."

In 1991, the DNA and Local 18 agreed to modify the work arrangements provision of the MOA in order to assign certain work to "persons outside the bargaining unit." In 1992, the parties agreed to a new contract that included a provision stating that

¹¹ Our dissenting colleague claims that our dismissal of this 8(a)(5) allegation reflects a "strict formalistic approach" which will discourage parties from developing workable stratagems for effective bargaining. We disagree. Indeed, we find the dissent's approach would have the very effect she wishes to avoid. Thus, in our view, providing parties with the flexibility to enter into and deviate from new bargaining formats without the risk of being found to have violated their obligation to bargain in good-faith facilitates effective bargaining and encourages productive experimentation. Conversely, prohibiting the resumption of bargaining in the separate appropriate units unless the parties expressly agree to rescind the permissive, two-stage bargaining format, would only inhibit parties from adopting creative stratagems to reach agreement.

[W]hen a computer is performing composing room work, the jurisdiction of the Union includes the preparation of input and all handling of output, operation of the computer and all input and output devices, programming . . . and maintenance of all the foregoing equipment and devices.

A work assignment dispute arose during the term of this contract. In 1993, Local 18 filed grievances challenging DNA's assignment of composing room work to nonunit graphic designers as well as the assignment of the inputting of codes and commands to nonunit telemarketing employees. An arbitrator upheld the grievances. In so doing, he referred to the MOA but relied primarily on the "broadly retained jurisdiction of Bargaining Unit work in the Composing Room as set forth in the Collective Bargaining Agreements before and after the 1991 Memoranda of Understanding."

Section 1 of Respondent DNA's proposal for a 1995 successor contract stated:

Notwithstanding any other provision of the agreement, the jurisdiction descriptions set forth in the contract are non-exclusive. Employees of other departments of the Agency [i.e. the Respondent] as well as employees of the Detroit News and Detroit Free Press may perform such work as is necessary including, but not limited to in-putting of text and graphics, creation and in-putting of ad, manual or electronic makeup or alteration of add [sic] (whole or partial pages), the inputting of computer program changes and codes, and the makeup of whole or partial pages. Material received from outside concerns will also be processed.

Respondent DNA characterized this proposal as a "shared jurisdiction" proposal intended to maximize the use of computer technology. At one bargaining session, Respondent DNA's representative discussed, as an example, management's desire to have advertising salespersons use their portable computers to compose ads for instant viewing while making sales calls on advertisers. In five bargaining sessions from March 22 through May 11, Local 18 refused to bargain over this proposal on the basis that Respondent DNA was seeking to bargain about a permissive subject, i.e., modifying the ongoing MOA. On May 11, DNA declared impasse and effectively implemented its work jurisdiction proposal.

The judge rejected the claim by the General Counsel and Local 18 that Respondent DNA had unlawfully made a midterm modification of a collective-bargaining agreement, i.e., the MOA, without Local 18's consent. ¹² He concluded that the MOA was not a fixed term agree-

ment because it lacked a definitive termination date. While relying on the absence of a fixed termination date, the judge also noted Respondent DNA's argument that the MOA's definition of work performed leaves the scope of Local 18's jurisdiction over composing room work to be defined by the current collective-bargaining agreement. Finally, the judge agreed with Respondent DNA that the parties had reached a valid impasse in bargaining on May 11, after the 1992–1995 contract had expired, and that Respondent DNA had lawfully implemented proposal 1.

We do not rely on the judge's finding that the MOA was not a "contract for a fixed period" within the meaning of Section 8(d). Although there is no identifiable calendar date for the agreement's termination, it is clearly not an open-ended contract. The MOA will expire when the last guaranteed job holder ceases to work for Respondent DNA. Until then, it is enforceable even in the absence of an overarching collective-bargaining agreement between the parties, and Respondent DNA cannot modify the MOA without Local 18's consent. *C* & *S Industries, Inc.*, 158 NLRB 454 (1966). See also *Heheman* v. *E. W. Scripps Co.*, 661 F.2d 1115 (6th Cir. 1981), denied rehearing en banc 668 F.2d 878 (1982), cert. denied 456 U.S. 991 (1982).

We nevertheless find that Respondent DNA did not violate the Act by the postimpasse implementation of its work jurisdiction proposal. We find that the language of the MOA is not conclusive in determining the scope of work jurisdiction for composing room unit employees.¹⁴ Instead, it guarantees lifetime unit work for specific job holders and, in Section 10(a), further defines work arrangements when scanners and VDT terminals are "performing composing room work within the jurisdiction of the Union." By itself, this provision of the MOA does not define what that jurisdiction is.¹⁵ It does not state that the described tasks must be performed only by unit employees. It is therefore of no consequence to the resolution of the 8(a)(5) issue presented here that the MOA remained in effect when Respondent DNA implemented its work jurisdiction proposal in May 1995.

Since, as explained above, the MOA did not change the description of the composing room unit, the issue of the legality of Respondent DNA's insistence on proposal 1 depends on whether it was intended to modify the

¹² Sec. 8(d) of the Act explicitly excludes from the general obligation to bargain, "any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

¹³ Members Hurtgen and Brame do not join their colleagues with respect to this paragraph. Inasmuch as the Board is finding that Respondent DNA did not modify the MOA, Members Hurtgen and Brame find it unnecessary to reach the issue of whether Sec. 8(d) applies to the MOA.

¹⁴ The Supreme Court held in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), that the Board can construe a labor agreement in order to decide whether an unfair labor practice has occurred.

¹⁵ Indeed, defining "work arrangements" as a synonym for jurisdiction, would require reading the initial sentence of the "Work Arrangements" section as a tautology. In effect, it would read: Local 18's jurisdiction is work within its jurisdiction.

scope of the unit as described in the parties' overall collective-bargaining agreement. The 1992–1995 contract, in section 6, defined the Union's jurisdiction "and the appropriate unit for collective-bargaining" as including "all composing room work," and it included a list of specific job classifications. In section 45, the reach of the Union's jurisdiction when "a computer is performing composing room work" was described. As noted at the beginning of this section, there are no exceptions to the judge's finding that proposal 1 was a mandatory subject of bargaining under Board precedent, 16 because, while it would give Respondent DNA authority to assign unit work to employees currently outside the unit, it did not purport to change the unit description or to preclude the Union from asserting that those to whom the work was assigned would properly be considered within the bargaining unit that it represented. There is, accordingly, no basis for a finding that Respondent DNA could not lawfully insist on this proposal. Thus, when the parties reached impasse after their contract had expired, Respondent DNA could lawfully implement its proposal. NLRB v. Katz, 369 U.S. 736 (1962). On this basis, we affirm the judge's dismissal of the complaint allegation.

Ш

Negotiations between Respondent Detroit News and the Guild for the News editorial employee unit produced several allegations of 8(a)(5) violations. We affirm the judge's findings that the News violated Section 8(a)(5) of the Act by unilaterally implementing its proposals regarding merit pay, television assignments, and by refusing to furnish the Guild with requested information regarding its merit pay and overtime-exemption proposals.

As to the merit pay proposal, we agree with the judge that the News engaged in overall bad-faith bargaining that precluded the possibility of reaching a bargaining impasse that would justify unilateral implementation of any of its bargaining proposals. In this regard, we note that throughout the 1995 negotiations, Respondent News proposed that all wage increases be based on merit. During this bargaining, however, Respondent News failed to timely respond to union requests as to how this proposal would work. For example, Respondent News failed to timely inform the Guild that it was proposing percentage wage increases based on the "actual" versus "minimum" wages of unit employees, and refused to provide the Guild with information as to how much money it proposed putting in the merit pay pool, even though Respondent News had formulated an internal document supplying that exact computation. Indeed, throughout negotiations, Respondent News repeatedly obfuscated and withheld details about its merit pay proposal, which details were relevant and necessary to the Guild's understanding of the proposal and to the formulation of a bargaining response.

In addition, during bargaining, Respondent News demonstrated its bad faith by proposing bargaining on dates during the latter part of June when it knew that the Guild was unavailable and by falsely informing employees that the Guild had refused to attend another scheduled bargaining session. Respondent News also exhibited its bad faith by misrepresenting the Guild's position on its merit pay proposal to unit employees, and by providing more information on its proposal to unit employees than it provided to their bargaining representative. For these reasons, as well as those additional ones relied on by the judge, we find that Respondent News failed to engage in good-faith bargaining on merit pay, thereby precluding a good-faith impasse.

Furthermore, we agree with the judge that even if the parties had reached good-faith impasse, the unilateral implementation of this proposal, without definable objective procedures and criteria, was inherently destructive of the statutory collective-bargaining process and therefore violated Section 8(a)(5). *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997).¹⁷

The situation involving the Guild's information requests about the News' overtime exemption proposal is a little different, but still warrants the finding of a violation. The News proposed to exempt qualified, requesting employees from the Fair Labor Standards Act's hourly pay and overtime requirements and to substitute a fixed

Members Hurtgen and Brame do not agree with their colleagues that the existence of unremedied unfair labor practices during 1995 negotiations necessarily precluded a good-faith impasse. They do agree, however, that based on the negotiations themselves, no valid impasse was reached. As Members Hurtgen and Brame agree with their colleagues that the Respondent engaged in bad-faith bargaining over merit pay, and that this conduct precluded a valid impasse, they need not, and do not, reach the *McClatchy* issue.

We note that the judge mistakenly identified the testimony about a May 3 meeting as that of Donald Kummer instead of the actual witness, Guild representative, Lon Mleczko. Kummer did not testify at the hearing.

¹⁶ Antelope Valley Press, supra, 311 NLRB at 461–462; Batavia Newspapers Corp., 311 NLRB 477 (1993).

¹⁷ We do not find, however, that the Respondent News demonstrated bad faith by first revealing that the existing performance appraisal would be the "primary basis" of merit pay recommendations in a March 31 memo distributed directly to the unit employees, rather than to the Guild negotiators. The News had revealed this intent in its initial bargaining proposal. We also do not rely on the judge's finding that the News' suggestion of a July 3, 1995 meeting with the Guild demonstrated bad faith because of its occurrence at "a foreseeably most inconvenient time" for the Guild negotiators. However, we agree with the judge's finding that other aspects of Respondent News' conduct in regard to the scheduling of the abortive July 3 meeting also manifested bad faith. Finally, in regard to the television news assignment proposal, the judge mistakenly suggested that Respondent News had failed to comply with the Board's remedial Order in Detroit News, 319 NLRB 262 (1995), which directed the News to rescind a prior unilateral implementation of the same proposal. That Order did not issue until several months after the second unilateral implementation of this proposal. Nevertheless, the fact that negotiations took place in the context of an unremedied unfair labor practice did preclude good-faith impasse.

salary for their services. In response to this overtime exemption proposal, the Guild requested information on June 14, July 10 and 11, and August 5, 1995, regarding which unit employees would be eligible. Its requests focused on the production of a list of employees whom the News believed would qualify for exemption if they asked for it. The News rejected the requests as "pointless and burdensome." It provided only an August 21, 1995 letter listing general employee classifications which might be eligible for the overtime exemption.

As an initial matter, we agree with the judge that the Guild was primarily seeking to determine the scope and impact of the proposal on unit employees, information that was clearly relevant to its role as their collective-bargaining representative. The News raises two defenses. First, it claims that it had no obligation to provide any information because the Guild had unlawfully characterized the overtime exemption proposal as illegal and refused to bargain about it. Second, Respondent News argues that it could not turn over the requested information because it did not possess any list and had no obligation to create one. We find no merit in either defense.

Regarding the Guild's alleged refusal to bargain, we agree with the judge that on June 14, the date of its initial request, the Guild retreated from its initial position that the overtime exemption proposal was illegal. Indeed, at the June 14 session, the Guild asked questions about the proposal, made a counteroffer, and made its first information request. Under these circumstances, we find that the Union was not refusing to bargain at the time of the information requests.

We further find that the News did not fulfill its statutory duty of providing specific information in some meaningful form in response to the Guild's requests. Respondent News does not contend that it had no information about the scope and impact of its overtime exemption proposal. We share the judge's doubts that it would have made the proposal, and bargained so ardently for it, without some informed estimation of its effects. Even if the News did not possess a list of those employees whom it believed would qualify for exemption, the Guild was entitled to whatever information Respondent News did rely on. See Pacific Maritime Assn., 315 NLRB 24, 26 (1994). As it was, the Guild was being asked to agree to a proposal without even a hint from its author whether it was likely to apply to only a few unit employees or to encompass a sizable portion of the unit. Under the circumstances, the proper response by Respondent News was to "request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." Keauhou Beach Hotel, 298 NLRB 702 (1990). For these reasons, we find that Respondent News violated Section 8(a)(5) of the Act by refusing to comply with the Guild's request for information.

IV.

We agree with the judge's finding that the Respondents' unfair labor practices were a cause of the Unions' July 13 strike and that the strike was therefore an unfair labor practice strike from its inception.¹⁸ In doing so, we find no need to rely on a per se causal relationship between the strike and any of the Respondents' unfair labor practices. We rely solely on the judge's analysis of the extensive credible record evidence regarding employee discussions, union communications (both to its membership and to the general public), and picket signs, all clearly indicating that, in reaching their decision to strike on July 13, the strikers were motivated at least in part by the prestrike unfair labor practices. 19 Walnut Creek Honda, 316 NLRB 139, 142 (1995), enfd. and petition for review denied on other grounds 89 F.3d 645 (9th Cir. 1996) (statements at strike vote meetings and in prestrike communications to employer indicative of strike causation).²⁰

V.

We affirm the judge's findings that the Respondents' failure to provide the employment letters issued to and signed by each striker replacement violated Section 8(a)(5) of the Act. We agree with the judge's rejection of the Respondents' defense, under Section 10(b) of the Act, that the Unions' April 17, 1996 charge was untimely filed (after the withdrawal and dismissal of two prior timely charges) more than the 6 months after the initial September 29, 1995 failure to furnish these documents. We find no need, however, to rely on the judge's finding that the Respondents fraudulently concealed this information. Instead, we note that the Unions twice repeated their original information request within 6 months of the April 17 charge. Each of the Unions' requests for information and each of the Respondents' failure to comply with the request gives rise to a separate and distinct violation of the Act. Public Service Electric & Gas Co., 323 NLRB 1182 (1997).

ORDER

It is ordered that fourth consolidated complaint paragraphs 48, 49, and 50, arising from the charge filed in Case 7–CA–38184 and relating to the issue whether the

¹⁸ Having found that the strike was an unfair labor practice from its inception, and in the absence of any contention by the Respondents that it converted to an economic strike at some later point, we find no need to pass on the judge's finding that 8(a)(1) threats to hire permanent replacements prolonged the strike.

¹⁹ We do not, of course, include in our causal analysis discussions and protests of employer actions that we have found were lawful, i.e., DNA's breach of the two-stage bargaining ground rules agreement with the Council and DNA's unilateral implementation of its work jurisdiction proposal for the composing room unit represented by Local 18.

²⁰ Although Members Hurtgen and Brame do not agree with their colleagues that the Respondents violated Sec. 8(a)(5) and (1) by failing to provide information concerning the Respondents' overtime exemption proposal, they agree that the other unfair labor practices found were a cause of the strike.

Respondents unlawfully failed to bargain about the terms and conditions of employment for strike replacements, are severed from the rest of this proceeding and reserved for separate consideration and decision by the Board.

IT IS FURTHER ORDERED that:

- A. The Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, Detroit, Michigan, its officers, agents, successors, and assigns shall
 - 1. Cease and desist from
- (a) Failing and refusing to bargain in good faith with the constituent member Unions of the Metropolitan Council of Unions as the respective exclusive bargaining representatives for the appropriate bargaining units as described in their respective collective-bargaining agreements, the most recent of which expired on April 30, 1995, by failing and refusing to timely and fully comply with the Unions' requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees that was necessary and relevant to the Unions' performance of their duties as the exclusive collective-bargaining agreements for their respective bargaining units.
- (b) Informing employees who were engaged in an unfair labor practice strike which started on July 13, 1996, that they had been or would be permanently replaced.
- (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Bargain collectively by the Unions named below by timely and fully complying with the requests for information of October 17, 1995, and January 18, 1996, regarding striker replacement employees necessary and relevant for the performance of their duties as the exclusive collective-bargaining representative for their appropriate units:

Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL–CIO; Detroit Typographical Union No. 18, Communications Workers of America, AFL–CIO; GCIU Local Union No. 13N, Graphic Communications International Union, AFL–CIO; GCIU Local Union No. 289, Graphic Communications International Union, AFL–CIO; Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL–CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL–CIO.

- (b) Upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since July 13, 1995.
- (c) Within 14 days after service by the Region, post at its facilities, including offices, warehouses, distribution centers, and printing plants in the Metropolitan Detroit, Michigan area, copies of the attached notice marked

- "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 1995.
- (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- B. The Respondent, The Detroit News, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Failing and refusing to bargain in good faith with Newspaper Guild of Detroit Local 22, The Newspaper Guild, AFL–CIO (the Guild) as the exclusive bargaining representative of employees in the appropriate bargaining unit by:
- (1) Unilaterally, and without agreement with the Guild or bargaining to a valid impasse, implementing a merit pay plan proposal or a bargaining proposal concerning the right to assign unit employees to make television appearances without additional compensation.
- (2) Failing and refusing to timely and fully comply with the Guild's oral requests of about April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts and criteria of its merit pay plan bargaining proposal; and the Guild's oral request of July 10, 1995, and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, all of which information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative in the following appropriate bargaining unit:

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

- All employees employed in the Editorial Department of the Detroit News, but excluding confidential employees, guards and supervisors as defined in the Act, and employees of Detroit News Washington, D.C. Bureau, and employees of other departments.
- (b) Removing from editorial offices' bulletin boards customarily reserved for the use of the Guild, and employee mail slots previously allowed for Guild communications, literature, and notices posted or placed therein by or on behalf of the Guild.
- (c) Informing employees who were engaged in an unfair labor practice strike which had commenced on July 13, 1996, that they had been or would be permanently replaced.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Bargain collectively, on request, with the Guild as the exclusive representative of the employees in the editorial bargaining unit concerning its merit pay plan proposal and all merit raises granted thereunder and its uncompensated television appearance policy proposal for unit employees, and if the Union requests, rescind all merit raises unilaterally granted thereunder and return to the status quo ante, and make whole any of those employees who may have suffered financial loss as provided in the remedy section of this decision.
- (b) Timely and fully comply with the Guild's oral requests of April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts and criteria of its merit pay plan bargaining proposal; the Guild's oral requests of July 10 and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation, including a list of employees it considered to be eligible for such salary; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, including striker replacement employment letters.
- (c) Upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since July 13, 1995.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facilities, including offices, warehouses, distribution centers, and printing plants in the Metropolitan Detroit, Michigan area, copies of the attached notice marked

- "Appendix B."22 Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 1995.
- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- C. The Respondent, The Detroit Free Press, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Failing and refusing to bargain in good faith with Newspaper Guild of Detroit Local 22, The Newspaper Guild, AFL—CIO (the Guild) as the exclusive bargaining representative of employees in the appropriate bargaining unit by refusing to fully and timely comply with the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacements employees, which information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the appropriate editorial bargaining unit.
- (b) Informing employees who were engaged in an unfair labor practice strike which started on July 13, 1996, that they had been or would be permanently replaced.
- (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Timely and fully comply with the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, including striker replacement letters.
- (b) Upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since June 13, 1995.
- (c) Within 14 days after service by the Region, post at its facilities, including offices, warehouses, distribution

²² See fn. 21, supra.

centers, and printing plants in the Metropolitan Detroit, Michigan area, copies of the attached notice marked "Appendix C."²³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, opinion denying the Respondents' motion to recuse and dissenting from the order to sever.

I write separately for two reasons. First, I explain my prior denial of the Respondents' motion to recuse me from participation in this case. Second, I dissent from the majority's decision to sever and reserve for future decision the issue of whether the Respondents' failure to bargain about the terms and conditions of employment for striker replacements violated Section 8(a)(5). In doing so, I set forth my view that the Board should overrule Service Electric, 281 NLRB 633 (1986), and related precedent, and find that the Respondents violated Section 8(a)(5) of the Act by unilaterally determining the wages and working conditions of striker replacements.

I.

The Respondents' recusal request refers to my written opinion in *Detroit Newspapers*, Cases 7–CA–39522 and 7–CA–39595 (*Detroit Newspapers II*) (326 NLRB 65 (1998), authorizing the General Counsel to seek an injunction under Section 10(j) of the Act, and to my public statements supporting the Board's decision to seek the injunction. They assert that I have impermissibly prejudged facts relevant to the dispute in this case (*Detroit Newspapers I*) so that my assumption of an adjudicative role would create an appearance of unfairness.

I have carefully considered the Respondents' motion and the arguments, and I have concluded that my opinion and public statements about unfair labor practice allegations involving the Respondents neither compromise my ability to decide impartially the instant case nor create an appearance of unfairness.

In support of their motion, the Respondents cite the Due Process Clause, cases decided under 28 U.S.C. § 455(a) and (b) governing the recusal of justices, judges and magistrates, and excerpts from the Model Code of Judicial Conduct for Federal Administrative Law Judges.² Section 455 and the Model Code require that judicial officials disqualify themselves in any proceeding in which they have an actual bias or in which their impartiality might reasonably be questioned. The aim of these provisions is to ensure that adjudicators not only are actually impartial, but also that they have not displayed any "appearance" of partiality which would undermine public confidence and trust. United States v. Singer, 575 F.Supp. 63 (D. Minn. 1983); and Limeco, Inc. v. Division of Lime, 571 F.Supp. 710 (D. Miss. 1983).

Under the actual bias standard, an adjudicator's public statements may form a basis for disqualification if they reveal that he has "adjudged the facts as well as the law of a particular case in advance of hearing it" and "made up his mind about important and specific factual questions and . . . [is] impervious to contrary evidence." *Steelworkers* v. *Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), cert. denied 453 U.S. 913 (1981) (citations omitted). Under the appearance of impropriety standard, the test for determining whether a judge should be disqualified is whether "an informed, reasonable observer would doubt the judge's impartiality," not that "someone who did *not* know the circumstances . . . might perceive the possibility" that the judge would be partial. *Matter of*

Sec. 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy.

The Model Code of Judicial Conduct provides in relevant part: Canon 2:

A. A judge . . . shall act at all times in a manner that promotes public confidence in the impartiality of the judiciary.

Canon 3:

B. A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. [Emphasis added.]

²³ See fn. 21, supra.

¹ As discussed infra, the Respondents refer to public statements and an opinion I have authored with respect to a proceeding under Sec. 10(j). I have appended copies of the opinion and statements at the end of sec. I.

² 28 U.S.C. § 455, as amended, provides in relevant part:

⁽a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

⁽b) He shall also disqualify himself in the following circumstances:

⁽¹⁾ where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

National Union Fire Insurance Co., 839 F.2d 1226, 1229 (7th Cir. 1988) (emphasis in original).

In my separate opinion in Caterpillar, Inc., 321 NLRB 1130, 1132–1134 (1996), I expressed agreement with the view of the Second Circuit that the "appearance of impropriety standard" which applies to the Federal judiciary does not apply in the administrative forum. See Greenberg v. Board of Governors of the Federal Reserve, 968 F.2d 164, 167 (2d Cir. 1992). Furthermore, I find that the parallel Model Code standard cited by the Respondents applies on its face to administrative law judges, not to agency heads in the Executive Branch. Still, I take the standards applicable to judges seriously and I am confident that my participation in this case conforms with such standards. I am likewise confident that there is no basis for my recusal here under the "actual bias" standard that is generally applicable to administrative proceedings. See Robbins v. Ong, 452 F.Supp. 110, 116 (S.D. Ga. 1978) (citing Megill v. Board of Regents of State of Florida, 541 F.2d 1073, 1079 (5th Cir. 1976).

The factual predicate for the Respondents' motion involves proceedings in *Detroit Newspapers II*. In that case, the General Counsel issued a complaint alleging that the Respondents violated Section 8(a)(3) and (1) of the Act by failing to reinstate employees who unconditionally offered to cease their unfair labor practice strike and to return to work. On May 23, the General Counsel recommended that the Board authorize him to petition a United States district court for temporary injunctive relief under Section 10(j) of the Act.

On June 19, Administrative Law Judge Wilks issued his decision in *Detroit Newspapers I*, which the Board reviews today. As previously discussed, Judge Wilks found, in relevant part, that the strike was an unfair labor practice strike from its inception. On July 1, the Board unanimously voted in the related case to authorize the General Counsel to seek a 10(j) injunction ordering the Respondents to reinstate unfair labor practice strikers who had made unconditional offers to return to work.

I authored an opinion providing my rationale for seeking injunctive relief. I also issued a public statement announcing the Board's action and explaining the reason the action was taken. On August 14, I issued a second public statement concerning the refusal of a United States district court judge to grant the injunctive relief requested. My opinion and public statements referred, inter alia, to Judge Wilks' unfair labor practice strike finding.

As an initial matter, I note that in neither my opinion or in my public statements did I purport to state my own view on the ultimate merits of this case. Rather, I referred to Judge Wilks' decision as buttressing the view that there was reasonable cause to believe that the Respondents had committed the unfair labor practices alleged in *Detroit Newspapers II*. I stated in my opinion, for example, that "I am of the view that there is reason-

able cause to believe that a violation of the Act has been made on the basis of Judge Wilks' findings and that these violations caused or prolonged the strike." The Respondents nevertheless claim, on the basis of this and other similarly phrased references to Judge Wilks' decision, that I have prejudged specific factual and legal issues in this case.³

An examination of the Board's procedures under Section 10(j) of the Act is a useful starting point for explaining why my opinion and public comments fell squarely within my official role as an adjudicator and interpreter of the statute, and neither demonstrate actual bias or create an appearance of impropriety. Section 10(i) of the Act authorizes the Board, upon issuance of a complaint by the Board's General Counsel, to "petition any district court of the United States . . . for appropriate temporary relief or restraining order." Board authorization is a precondition to the institution of a 10(i) proceeding. The courts have generally required a showing that there is reasonable cause to believe that the Act has been violated before granting injunctive relief. Fuchs v. Hood Industries, 590 F.2d 395 (1st Cir. 1979); Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979); and Biore v. Teamsters Locals (Pilot Motor Freight Carriers, Inc.), 479 F.2d 778, 787 (5th Cir. 1973). Hence, although Section 10(j) does not expressly establish a "reasonable cause" standard, one of the factors which the Board must consider in deciding whether to authorize the General Counsel to seek 10(j) relief is whether there is reasonable cause to believe that the respondent has violated the Act.

There is understandably an inherent disquietude whenever a Board member adjudicates a case involving a respondent against whom he has earlier authorized 10(j) proceedings. However, the statutory scheme under which the Board finds reasonable cause for seeking an injunction against a respondent and subsequently adjudicates the underlying case involving that respondent has repeatedly been upheld by the courts. See *NLRB* v. *Sanford Home for Adults*, 669 F.2d 35, 37 (2d Cir. 1981); *Eisenberg ex rel NLRB* v. *Holland Rantos Co.*, 583 F.2d 100, 104 fn. 8 (3d Cir. 1978); *and Kessel Food Markets, Inc.* v. *NLRB*, 868 F.2d 881, 888 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989).

The Supreme Court addressed generally the risk of bias or prejudgment in this sequence of functions in *Withrow* v. *Larkin*, 421 U.S. 35 (1975). The Court held that a state board's determination resulting from a nonadversary investigation that there was "probable cause to believe" that a violation of state law had occurred did not establish "prejudice and prejudgment" which would disable the board from hearing and deciding the same issues in a later adversary hearing, even

³ I note that the Respondents do not complain of my implicit reliance on Judge Wilks' decision in voting not to authorize the General Counsel to seek 10(j) relief on the grounds of an 8(a)(5) allegation that the judge dismissed.

though the board would necessarily consider evidence to which it had been exposed in the earlier proceeding. Id. at 55–56. The Court's reasoning is dispositive of many of the arguments raised in the Respondents' brief in support of its motion and is well worth repeating here:

Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. It is also very typical for members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. . . . We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. . . .

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Id. at 56–58.

These precedents rest on the well-established presumption that decisional officials are persons of honesty and integrity, capable of overcoming their prior inclinations, knowledge, and conclusions which result from prior judicial contact. *Withrow*, supra at 53–54; *Panozzo* v. *Rhoads*, 905 F.2d 135, 140 (7th Cir. 1990). The presumption of objectivity which applies to decisional officials acting in their official capacity may be rebutted upon a showing of deep-seated favoritism or antagonism that would make fair judgment impossible. *Liteky* v. *United States*, 510 U.S. 540, 555 (1994). The Respondents have not made such an allegation in this case. The Respondents are merely the subject of a determination by

the Board to seek injunctive relief under Section 10(j), which the courts have repeatedly held does not create an impermissible risk of bias or prejudgment.

Attempting to distinguish this case, the Respondents seize upon the fact that Judge Wilks' decision did not concern the precise complaint allegations on which the General Counsel was seeking injunctive relief in Detroit Newspapers II, but involved related allegations contained in the prior complaint in Detroit Newspapers I. Reference to Judge Wilks' decision and the facts underlying the decision could not logically be avoided, however, because they provide the factual and legal underpinnings of the General Counsel's allegation that the Respondents unlawfully refused to reinstate unfair labor practice strikers. Simply put, the Board could not determine whether there was reasonable cause to believe that the Respondents had unlawfully refused to reinstate strikers without first determining that there was reasonable cause to believe that the Respondents had committed the unfair labor practices found by Judge Wilks which, if committed, converted the strike into an unfair labor practice strike. Accordingly, my knowledge regarding the facts of this case and the opinions it produced were properly acquired while acting in my official capacity of determining whether to authorize 10(j) proceedings and were necessary to the completion of that task.

The Respondents also appear to be arguing broadly that the issuance of any public statement by a Board member explaining the Board's decision to seek 10(j) relief creates an appearance of unfairness and that members should abstain from commenting publicly about the Board's 10(j) proceedings. The Respondents note the absence of a specific requirement in Section 10(i) of the Act or in the Board's Rules and Regulations calling for the issuance of a formal opinion, and the absence of any precedent in the Board's history for the issuance of an opinion or public statement in these circumstances. In my view, the silence which the Respondents' would impose on the Board concerning its decisions to authorize 10(j) proceedings is not mandated by the "actual bias" or the "appearance of impropriety" standards alluded to above. As a general matter, agency members are free to inform the public of agency activities and policies. See American Medical Associates v. F.T.C., 638 F.2d 443, 449 (2d Cir. 1980), affd. 455 U.S. 676 (1982). Thus, the Board and Regional Offices routinely issue press releases which report the status of Board proceedings under Section 10(j). Moreover, the Sixth Circuit rejected a similar argument in NLRB v. Richard W. Kaase Co., 346 F.2d 24 (6th Cir. 1965). In Kaase Co., the then-Chairman of the Board Frank W. McCulloch delivered a speech in which he explained the Board's policies on seeking interim injunctions under Section 10(j). In the course of his explanation, he referred to the Kaase Company's situation as one where "the violation seemed clear and the damage irreparable." Id. at 28. Kaase moved to dismiss the Board's petition for enforcement of its final order. The court denied the motion, stating that:

Whether it was politic for [the then] Chairman McCulloch to have referred to the Kaase matter is not our concern. Quite obviously, the Board under advice of its General Counsel was of an initial impression that a violation had occurred. Otherwise, an injunction would not have been sought. Such impression, however, did not foreclose impartial consideration of the matter upon a full hearing. A judge who is sufficiently impressed with a plaintiff's case to issue a preliminary injunction is not thereby disqualified from presiding at a trial on the merits.

Id. See also FTC v. Cinderella Career & Finishing Schools, 404 F.2d 1308, 1314 (D.C. Cir. 1968) (no impermissible prejudgment where Federal Trade Commission issued a press release stating that it had "reason to believe" that there had been violations). The holding in Kasse Co. easily extends to my comments concerning this case, which—to the extent that they could be viewed as at all prejudgmental notwithstanding all of the above—were much less suggestive of prejudgment on the merits.

Finally, I wish to explain once again my purpose in commenting on the Board's decision to seek an injunction. As a general matter, and certainly in a case with high visibility, it is useful for the public to know more about what we do and, more importantly, why we do it. In my view, public explanation of the Board's processes will enhance its reputation for fairness and impartiality in the long run. On the other hand, replacing the veil of mysticism and obscurantism over the Agency's processes would raise far more serious concerns about unfairness than any such characterization of my statements which were aimed at informing the public. In fact, in McLeod v. General Electric Co., 257 F.Supp. 690, 709 fn. 14 (S.D. N.Y. 1966), revd. on other grounds 366 F.2d 847, 850 (2d Cir. 1966), the court, for essentially these reasons, encouraged the Board to make public the criteria by which it determines to proceed under Section 10(j).

In summary, having carefully reviewed the Respondents' motion and the arguments contained therein, I have concluded that there can be no legitimate concern on the basis of my opinion and public comments that I have prejudged factual and legal issues in this case, or in any way compromised the appearance of impartiality in the eyes of "an informed reasonable observer." I have therefore denied the Respondents' motion and participated fully in decisional review of this case.

CHAIRMAN GOULD'S OPINION AUTHORIZING THE GENERAL COUNSEL TO SEEK A SECTION 10(J) INJUNCTION

CHAIRMAN GOULD, partially authorizing the General Counsel's recommendation:

INTRODUCTION

I am not aware of any precedent for the issuance of a written opinion by a Board Member providing a rationale for a Member's vote in cases involving Section 10(j). And, most certainly, in the overwhelming number of cases this could not be done because of the sheer volume of work and the need for prompt decisionmaking. However, in the instant case, I am of the view that it is important to set forth my rationale because of the high national and international visibility given to this case. As a general matter, and certainly in the circumstances of this case, the public needs to know more about what we do and, even more important, why we do it. That is why I write this opinion which sets forth my rationale.

This case is before the Board by virtue of a recommendation made on May 23, 1997, by the General Counsel at the request of five unions that so-called 10(j) proceedings be instituted against The Detroit Newspapers, f/k/a Detroit Newspaper Agency, The Detroit News, Inc. and the Detroit Free Press, Inc. (hereinafter to be referred to as the Employers) to obtain interim relief for violations of the National Labor Relations Act in refusing to reinstate unfair labor practice strikers who have made unconditional offers to return to work and have not been discharged for strike misconduct. The General Counsel, the Employers, the Union, and counsel for replacement workers presented position statements on the propriety of Section 10(j). New procedures instituted in early 1994 by our Board make it possible for all Board Members to have access to position papers filed by all parties. I requested those position papers and, on May 30, 1997, they were provided. Although I do not touch upon all contentions raised by all parties, I have reviewed the documents in their entirety.

Oral Argument was requested by the Employers, but a unanimous Board has this day denied this request.

More than 100 unfair labor practice charges have been filed by and against the parties to this dispute with multiple allegations. Indeed, on March 14, 1997,² the Board

^{1 &}quot;Where a strike is caused in part by an employer's unfair labor practices, the employees are entitled to reinstatement." W. Gould, A Primer On American Labor Law, p. 98, MIT Press, (3d edit. 1993) See NLRB v. International Van Lines, 409 U.S. 48 (1972). The Board has long held that an employer's unfair labor practices during an economic strike do not ipso facto convert it into an unfair practice strike. C-Line Express, 292 NLRB 638 (1989), enf. denied on other grounds 873 F.2d 1150 (8th Cir. 1989). Rather the General Counsel must prove that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused or prolonged the work stoppage, and, in determining this causal nexus, the General Counsel may rely upon both subjective and objective factors. Chicago Beef Co., 298 NLRB 1039 (1990), enfd. 944 F.2d 905 (6th Cir. 1991). As noted infra, the administrative law judge's decision, coupled with the position papers presented, provide a basis for concluding that there is an adequate nexus between the conduct found by the judge and the strike.

² Teamsters Local 372 (Detroit Newspapers), 323 NLRB 278 (1997).

On June 27, 1997, in *Teamsters Local 372 (Detroit Newspapers)*, Cases 7–CC–1667 and 7–CC–1670, the Board disapproved another

disapproved a settlement between the General Counsel and the Respondent Unions Teamsters Local No. 372, International Brotherhood of Teamsters, et al., arising out of unfair labor practice charges filed by the Employers. I wrote a concurring opinion providing the basis for my views ³

On June 19, 1997, Administrative Law Judge Thomas R. Wilks rendered a 113-page decision in which he made numerous findings and found various violations of the statute and that the unfair labor practices found either caused or prolonged the strike. Subsequent to the issuance of Judge Wilks' decision, the Board members cast their votes. Today, I have cast my vote to partially authorize the General Counsel to seek injunctive relief in federal district court. Thus, there is a majority to authorize the General Counsel to proceed in this matter. As discussed below, I am of the view that there is reasonable cause to believe that a violation of the Act has been made on the basis of Judge Wilks' findings and that these violations caused or prolonged the strike.⁴

proposed unilateral formal settlement (resubmitted) agreement between the General Counsel and the Respondent Unions.

On June 25, 1997, in *Detroit Newspaper Agency & Detroit News, Inc.*, Cases 7–CA–38079, et al., the Board granted the General Counsel's and the Charging Parties' special appeal, vacated another administrative law judge's May 6, 1997 protective order, and remanded to the judge for reconsideration after obtaining the parties' positions and for issuance of a fully articulated decision setting forth the legal and factual basis for his decision.

³ In my view, the proposed settlement agreement in Teamsters Local No. 372 (Detroit Newspapers) failed to adequately address the complaint allegations that the Respondent Unions violated the secondary boycott prohibition contained in Sec. 8(b)(4)(ii)(B) by engaging in certain specified conduct, including signal picketing, mass handbilling, and walkthroughs. As I noted, the Board, in evaluating settlement agreements, both formal and informal, considers a number of factors, including whether the settlement stipulations are reasonable in light of the nature of the violations alleged in the complaint and other surrounding circumstances, and whether it will bring an early restoration of industrial peace. See Independent Stave Co., 287 NLRB 740, 741-743 (1987). I found that these factors were particularly applicable to the alleged 8(b)(4)(B) violations which are subject to the mandatory injunction procedures of Sec. 10(1) of the Act. Under 10(1), unlike 10(j), the Board is not involved in statutory interpretation and must rely upon the General Counsel's determination that there is "reasonable cause" to support an 8(b)(4) complaint, and must assess the settlement agreement against the allegations and determine whether it is consistent with the integrity of the General Counsel's complaint. The proposed settlement agreement rejected by the Board left close issues under 8(b)(4) unresolved by including a nonadmissions clause and by failing to specify whether the alleged conduct was prohibited and subject to contempt sanctions. Further, statements by the Unions indicated that they intended to continue their prior activities and that they believed that the settlement sanctioned such conduct. Such statements clearly undermined the efficacy of the stipulated notice to employees and members. Accordingly, in the circumstances of this case, I found that the Board could best preserve the integrity of its remedial authority by rejecting the settlement

⁴ The administrative law judge found no merit in the complaint allegation related to the modification of unit work. I do not authorize the General Counsel to proceed on the basis of that allegation. Nor do I authorize the General Counsel to proceed on the theory that the Employers were obliged to bargain with the Unions about the terms and conditions of strike replacements. The General Counsel, in his pro-

STATUTORY BACKGROUND

Under the Act's remedial provisions, the Board may, at its discretion, petition a federal district court for a preliminary injunction whenever the Board believes that temporary relief is required to accomplish the purposes of the Act. Section 10(j) provides that, subsequent to the General Counsel's recommendation, "[t]he Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order."5 Thus, Section 10(j) provides express statutory implementation of the Board's broad authority contained in Section 10(a) of the Act to "prevent" any person from engaging in any unfair labor practice. Enacted as part of the Taft-Hartley amendments of 1947, Section 10(j) represents Congressional recognition that

by reason of lengthy hearing and litigation enforcing its order, the board has not been able in some instances to correct unfair labor practices until after some substantial injury has been done. . . . [I]t has sometimes been possible for persons violating the Act to accomplish their illegal purpose before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo."⁶

The courts also recognize that Section 10(j) is "designed to fill the considerable time gap between the filing of a complaint by the Board and issuance of its final decision, in those cases in which considerable harm may occur in the interim."

As the 1994–1995 baseball dispute made clear,⁸ Section 10(j) is a critical element of the National Labor Relations Act's statutory scheme. Under Section 10(j), after the issuance of the complaint, a Regional Director who believes that injunctive relief is warranted sends a recommendation for 10(j) relief to the General Counsel. If, after reviewing the case, the General Counsel agrees that injunctive relief is warranted, the Regional memorandum is sent to the Board for review. Board authoriza-

posed authorization to us, is silent on this issue—although the Regional Director explicitly states that this theory "would not be an appropriate basis on which to argue for injunctive relief."

⁵ 29 U.S.C. §160 (j).

⁶ S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947).

⁷ Fuchs v. Hood Industries, 590 F.2d 395 (1st Cir. 1979) (citing Sears, Roebuck & Co. v. Carpenters Local 419, 397 U.S. 655, 658–659 & fn. 5 (1970)). In 1996, the median days from the filing of a charge to the issuance of the Board's decision was 591, and from issuance of an administrative law judge's decision to the Board's final decision was 217

⁸ In Silverman v. Major League Baseball Player Relations Committee, 880 F.Supp. 246 (S.D.N.Y 1995), affd. 67 F.3d 1054 (2d Cir. 1995), the Federal judiciary approved the Board's request for injunctive relief and, as noted infra, peaceful relations between the parties were substituted for strife and a comprehensive collective-bargaining agreement was negotiated.

tion is a precondition to the institution of a 10(j) proceeding. If a majority of the Board authorizes the 10(j) request, the General Counsel notifies the regional director who then files a petition for injunctive relief in district court.

Upon the filing of a petition for preliminary relief, the court has "jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." In deciding when injunctive relief is warranted under 10(j), the district court must decide whether there is "reasonable cause" to believe that the respondent has engaged in unfair labor practices and whether temporary relief is "just and proper" under the circumstances. In assessing whether injunctive relief is required, the courts have considered:

such factors as the need for an injunction to prevent frustration of the basic remedial purpose of the act and the degree to which the public interest is affected by a continuing violation as well as more traditional equitable considerations such as the need to restore the status quo ante or preserve the status quo.¹¹

In *Fuchs* v. *Hood Industries*, supra, the First Circuit found it unnecessary to stay a 10(j) petition until an administrative law judge rendered an opinion. ¹² Although the court found that a decision regarding the 10(j) petition could be rendered before the results of a full eviden-

tiary hearing were known, the court recognized that the administrative record could be of "considerable assistance, in expediting the work of the court, which now must develop a record and make findings which would be capable of review." The Second Circuit, in Seeler v. Trading Port, Inc., affirmed a district court's finding that it had reasonable cause to believe that unfair labor practices had been committed, noting that "the district court's conclusion is bolstered by the subsequent findings of the administrative law judge to the effect that extensive unfair labor practices had in fact been committed." In the instant case, the Board has the benefit of the administrative law judge's rulings, findings, and conclusions.

ANALYSIS

The General Counsel's argument, and Judge Wilks' decision, deal with the allegation that the employers have engaged in an unlawful refusal to bargain with the unions in a number of respects by virtue of the following conduct: (1) unilaterally modifying and abrogating an agreement to engage in "hybrid" multiparty bargaining; (2) unilaterally instituting a bargaining proposal which modified the scope of the bargaining unit and other contractual obligations; (3) refusing to furnish relevant information about its merit pay increases and overtime exemption proposals to the union; (4) unilaterally implementing merit increases and changes in conditions of employment relating to television appearances by reporters; and (5) refusing to provide requested information about striker replacement employees.

In accordance with the above-cited precedent, the Court of Appeals for the Sixth Circuit, in whose jurisdiction this case arises, has held that in order for an injunction to issue under Section 10(j) of the Act two ingredients must be present: (1) a reasonable cause to believe that unfair labor practices have occurred and (2) that injunctive relief is just and proper.¹⁵

The bulk of 10(j) litigation arises subsequent to the issuance of a complaint by the General Counsel, but prior to a ruling by an administrative law judge. ¹⁶ This is be-

^{9 29} U.S.C. §160(j).

¹⁰ Sec. 10(j) does not expressly establish a "reasonable cause" standard; however, the courts have generally applied this test. Major League Baseball Player Relations Committee, supra; Fush v. Hood Industries, 590 F.2d 395 (1st Cir. 1979); Levine v. C & W Mining Co., Inc., 610 F.2d 432 (6th Cir. 1979); Boire v. Teamsters (Pilot Motor Freight Carriers), 479 F.2d 778, 787 (5th Cir. 1973). The case law is less uniform with respect to the interpretation of the "just and proper" standard. The United States Courts of Appeals for the First, Second, and Seventh Circuits have read the "just and proper" requirement as a statement that traditional equitable criteria apply. Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953 (1st Cir. 1983); Silverman v. 40-41 Realty Associates, 668 F.2d 678 (2d Cir. 1982); Squillacote v. Food Workers, 534 F.2d 735 (7th Cir. 1976). In Kinney v. Pioneer Press, 881 F.2d 485 (1989), the Seventh Circuit held that the only question for the court was whether injunctive relief was "just and proper" and rejected the "reasonable cause" requirement. The Third, Sixth, Eighth, Tenth, and Eleventh Circuits have held that the "just and proper" requirement is met by a showing that the relief is necessary to restore the status quo and protect the Board's remedial powers under the Act. Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir. 1993); Pascarell v. Vibra Screw, Inc., 904 F.2d 874 (3d Cir. 1990); Meter v. Minnesota Mining & Mfg. Co., 385 F.2d 265 (8th Cir. 1967); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967); and Arlook v. S. Lichtenberg & Co., 952 F.2d 367 (11th Cir. 1992). In Miller v. California Pacific Medical Center, 19 F.3d 449 (1994), the Ninth Circuit joined the Seventh Circuit in abandoning the "reasonable cause" standard in 10(j) proceedings, applied traditional equitable criteria to the "just and proper" requirement, and concluded that district court should also weigh the possible frustration of the Board's remedial purposes as a factor in considering the underlying purpose of Sec. 10(j).

¹¹ Szabo v. P*I*E Nationwide, 878 F.2d 207, 210 (7th Cir. 1989) (quoting Food Workers, supra, 534 F.2d at 744).

¹² 590 F.2d 395 (1979).

¹³ Id

¹⁴ 517 F.2d 33, 37 fn. 7 (1975).

¹⁵ See *Kobell v. Paperworkers*, 965 F.2d 1401, 1406 (6th Cir. 1992); *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). In their position papers the employers refer to a "competing strike" newspaper, the threat of sabotage, "unclean hands" and harm to both the employers and replacement workers as a basis for denying injunctive relief under the just and proper standard. But union assurances that they will discontinue publication of the strike newspaper in the event of reinstatement of strikers, the absence of evidence that strikers reinstated to date have engaged in misconduct or unprotected activities, the General Counsel's determination not to seek injunctive relief providing for reinstatement for those who were discharged for strike misconduct and the fact that economic difficulties for employers and employees in reinstatement cases are always present, convince me that equitable relief cannot be denied on these grounds.

¹⁶ However, it is not unprecedented to authorize 10(j) relief after an administrative law judge's decision has issued. In 1994, the Board authorized 4.

cause it takes an appreciable period of time from issuance of a complaint until an administrative law judge's ruling.¹⁷ However, in this case, the administrative law judge has ruled, and the relevance of this is that the existence of such a decision serves as an important adjunct to our reasonable cause determination. The findings, based upon the record before the administrative law judge, as well as his assessment of the demeanor of the witnesses and his conclusions of law, are our starting point.

I am of the view that there is reasonable cause to believe that a violation of the Act has been made out in connection with all of the refusal to bargain areas where the administrative law judge has found violations and that the violations caused or prolonged the strike. Specifically, I do not vote to authorize the General Counsel to seek injunctive relief on the grounds, cited by the General Counsel but dismissed by the administrative law judge, that on May 11, 1995, the Detroit Newspaper Agency unilaterally implemented a bargaining proposal modifying the scope of the bargaining unit and modifying the "Memorandum of Agreement" dated June 17, 1975. Nor do I authorize the General Counsel to proceed on the theory that the Employers were obliged to bargain with the Unions about the terms and conditions of strike replacements. Though I am of the view that existing Board precedent¹⁸ is inconsistent with the principles of the Act, e.g., Chicago Tribune Co., 318 NLRB 920, 928 fn. 30 (1995), I do not believe that the reversal of precedent should be undertaken through 10(j) litigation.

Accordingly, I believe that there is reasonable cause to believe that violations of the statute have been made out and this view is buttressed substantially by the administrative law judge's decision. I am of the view that the relief sought, i.e., reinstatement of the strikers who have offered unconditionally to return to work and have not been discharged for strike misconduct, under Section 10(j) is thus just and proper under the circumstances of

¹⁷ Ordinarily, the Board would not delay authorizing 10(j) relief while awaiting the issuance of an administrative law judge's decision. In this case, the failure to reinstate occurred in February 1997. Accordingly, there has been no undue delay, and the Board has the advantage of considering the judge's findings and conclusions without the risk that undue delay might undermine the propriety of injunctive relief.

¹⁸ See, e.g., Leveld Wholesale, Inc., 218 NLRB 1344 (1975); Service Electric Co., 281 NLRB 633 (1986); and Goldsmith Motors Corp., 310 NLRB 1279 (1993). Reversal of this line of authority is more consistent with the holding of the U.S. Supreme Court in Curtin Matheson Scientific v. NLRB, 494 U.S. 775 (1990), in which the Court said that the Board's refusal to presume strike replacement opposition to the union was not "irreconcilable" with these holdings.

¹⁹ Of course, novel points of law—as distinguished from reversal of precedent—are appropriate for 10(j) proceedings. See fn. 8, supra. While the General Counsel has distinguished the instant case from existing precedent by virtue of the strike's unfair labor practice context, my judgment is that this issue should be resolved only after briefs are filed with the Board in a full fledged 10(c) proceeding, rather than by the federal district court in the 10(j) aspect of this litigation.

the instant case and therefore should be granted by a district court.²⁰

The administrative law judge found on June 19, the issue of the right of strikers to return to work and their ability to displace replacement workers has "become a major impediment in negotiations."²¹ In my view, the collective-bargaining process cannot proceed effectively in the weeks and months to come unless prompt relief is granted on the reinstatement issue. This appears to be an appropriate part of 10(j) relief inasmuch as through such relief, the Board attempts to promote the collectivebargaining process which has thus far been burdened by what the administrative law judge found to be unfair labor practices—and what I find here to be reasonable cause to believe are unfair labor practices. It is to be recalled that 2 years ago in the baseball dispute, injunctive relief produced both industrial peace and the revival of the collective-bargaining process which culminated in the negotiation of a comprehensive collective-bargaining agreement.

An equally appropriate part of 10(j) relief is the avoidance of the delay caused by lengthy litigation before the Board and in enforcing the Board's Order. Although the median number of days from issuance of an administrative law judge's decision to the issuance of the Board's decision has continued to decrease during these past 3 years, 22 the average time remains approximately 7 months. When viewed together with the length of the hearing transcript, approximately 3000 pages, more than five times the length of an average transcript, the likely delay before relief is granted is considerable, even putting aside the time required to gain enforcement of the Board's Order in the circuit court of appeals. The enforcement proceedings are likely to add significantly to the period required for the resolution of the issues here. In those cases where the propriety of the Board's Order has been challenged in court, the median number of days from issuance of the Board's decision to the court of appeals' order is 474. Thus, I would also find that 10(i) relief is just and proper to avoid the harm which is likely

²⁰ I have not always agreed with the General Counsel's recommendations to seek 10(j) relief, and, during my tenure at the Board, I have voted against authorizing injunctive relief in 17 cases. I have always assumed—and do so again in this opinion and authorization—that the same standards applicable to federal district courts under Sec.10(j) apply to the Board at the authorization stage.

²¹ Detroit Newspapers, supra at 104.

²² In 1994, the median number of days from issuance of the administrative law judge's decision to issuance of the Board's decision was 241. By 1997, the median number of days had decreased to 210. The reduction in time is due, at least in part, to several initiatives, namely the "Speed Team" case handling process, the "Super Panel" system, and the increased use of bench decisions, implemented by the Board to expedite the resolution of certain cases. For a more detailed description of these initiatives, see *Three-Year Report by William B. Gould IV, Chairman, National Labor Relations Board*, Bureau of National Affairs Daily Labor Report, No. 45, at A1; text at E1-E14, March 7, 1997; 48 Lab. L.J. 171 (April 1997).

to occur before the Board's decision is enforced in the event that the Board finds a statutory violation and sufficient nexus to the strike.

The strikers, like dismissed workers, may "scatter to the winds," thus making ultimate relief at some point in the future an ineffective remedy. Indeed, the parties have asserted that many have already left the area in search of alternative jobs-and there is no reason to assume that this process will not continue. As the court said in *Blyer* v. *Domsey Trading Corp*.:²³ "Any further delay in reinstatement will likely cause the employees to seek employment elsewhere, rendering ineffective any final relief ordered by the Board." The one decision providing for a contrary result, Kobell v. Suburban Lines, Inc., 24 arose where the court found that a "small and intimate bargaining unit" established a history of collective bargaining which could reconstitute itself upon issuance of the Board order in the unfair labor practice case itself. But Suburban Lines, Inc. is quite different from the relationship involved here and the numerous unfair labor practices found by the administrative law judge. Moreover, Domsey Trading Corp. represents the weight of authority.²⁵

Finally, as noted supra, all that is required for reinstatement is a nexus between unfair labor practice conduct and the strike. Thus, the Employers' June 24 Fifth Additional Information Letter which states that Judge Wilks found that, "the strike was largely caused by economic factors and might well have occurred in the absence of any unfair labor practices" misses the point. In fact, in the context of discussing the Employers' duty to bargain regarding strike replacements, Judge Wilks stated that "the strike was caused in large part by the unfair labor practices," and that the unions and unit employees "chose to strike in part to redress certain unfair labor practices." Under the circumstances of this case the administrative law judge's decision establishes an adequate nexus.

CONCLUSION

Thus, on the basis of the position papers provided by the parties and the legal arguments set forth therein as well as the administrative law judge's decision, I conclude that relief is just and proper and that there is reasonable cause to believe that violations have been committed. Accordingly, except on the issues of unilaterally instituting a bargaining proposal that changed the scope of the bargaining unit and the duty to bargain about the terms and conditions of strike replacements where the administrative law judge found no violations, I vote to authorize the General Counsel to proceed in federal district court to obtain 10(j) relief which would require the reinstatement of striking employees who have unconditionally offered to return to work and have not been discharged for strike misconduct.

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE (R-2236) Tuesday, July 1, 1997 202/273-1991

STATEMENT BY NLRB CHAIRMAN WILLIAM B. GOULD IV REGARDING THE BOARD'S AUTHORIZATION TO SEEK INJUNCTIVE RELIEF IN THE DETROIT NEWSPAPERS CASE

I am pleased that a unanimous Board has this day authorized injunctive relief in The Detroit Newspapers dispute in that city. In so doing, we have invoked a special mechanism of our law and we have instructed both the General Counsel in Washington and the Regional Director in Detroit and their representatives to proceed immediately in federal district court in Detroit and to seek an injunction which will, if granted, obtain the reinstatement of those strikers who have unconditionally offered to return to work and who have not been discharged for strike misconduct.

When I took the oath of office as Chairman of the National Labor Relations Board more than three years ago, I pledged and renewed my commitment to the rule of law in labor-management relations throughout the United States. My vote to seek injunctive relief now mirrors that commitment.

The public policy of this country, as reflected in the National Labor Relations Act, which my agency administers, is the encouragement of the practice and procedure of collective bargaining and the promotion of freedom of association amongst all employees covered by the Act. Thus, collective bargaining—through which our Nation seeks to translate the democratic principles so well accepted in our political process into workplace relations—is at the heart of our legal system. This means rights and obligations for both sides—labor and management.

Two years ago, the Board took similar action, albeit in a different context, in the difficult and lengthy baseball dispute of 1994–1995. The success of that initiative restored peaceable relations between the parties, saved the

²³ 139 LRRM 2289, 2291 (E.D.N.Y. 1991).

²⁴ 731 F.2d 1076 (3d Cir. 1984).

²⁵ See Pascarell v. Orit Corp./Sea Jet Trucking, 705 F.Supp. 200, 204, (D. N.J. 1988), affd. mem. 866 F.2d 1412 (3d Cir. 1988); Silverman v. Reinauer Transportation, 130 LRRM 2505, 2508 (S.D. N.Y. 1988), affd. 880 F.2d 1319 (2d Cir. 1989); D'Amico v. Cox Creek Refining Co., 719 F.Supp. 403, 409 (D. Md. 1989). Accord: Berkowitz v. Galvanizers, Inc., 105 LRRM 3447 (N.D. Cal. 1980); Leventhal v. Car-Riv Corp., 96 LRRM 2899, 2902 (E.D. Pa. 1977). Cf. Rivera-Vega v. ConAgra, Inc., 70 F.3d 153 (1st Cir. 1995).

baseball seasons of 1995 and 1996, revived collective bargaining, and led to the negotiation of a comprehensive collective bargaining agreement late last year.

The National Labor Relations Act contains great strengths, notwithstanding its deficiencies. In the final analysis, its ability to function effectively lies in its enforcement mechanism under Section 10(j). It is this provision which we have invoked today—and the purpose of my vote is to substitute dialogue for strife, to induce the parties to reason with one another, and to foster the practice and procedure of collective bargaining within the parameters of the law.

This approach, which lies at the heart of our law, is what I have opted for today. It seeks to prod all parties to resolve their differences through their own autonomous system which has served our Nation so well. Today I urge the parties to use their procedures to the best of their abilities.

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NATIONAL LABOR RELATIONS BOARD WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE Thursday, August 14, 1997 (R-2247) 202/273-1991

STATEMENT BY WILLIAM B. GOULD, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ON COURT DENYING 10(J) INJUNCTIONS IN DETROIT NEWSPAPERS CASE

The federal district court judge has issued his ruling on the Detroit Newspapers injunction case today. Of course, I am respectful of the judicial process. Nonetheless, I regret this decision because it appears to proceed upon erroneous assumptions about fact and law. Fact, because the administrative law judge concluded that the reinstatement issue impeded bargaining progress on the basis of evidence presented to him. In most instances, there has been no hearing, let alone an administrative law judge decision, prior to the commencement or completion of a 10(j) proceeding. The existence here of a hearing and conclusions by an administrative law judge buttressed the evidence presented by the Board.

On the law, the judge states that the reinstatement question cannot be resolved until there has been a "final" affirmative answer on the unfair labor strike issue. With all respect, this conclusion is in error and, if accepted, would completely undercut Section 10(j). The striker reinstatement issue is one of liability rather than remedy.

Again, I regret today's decision. In line with the judge's conclusion the Board shall endeavor to "expedite" its review of this matter. But it is an understatement to say that exclusive reliance upon the administrative

process is second best and arguably ephemeral under the circumstances of this case.

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II.

I dissent from my colleagues' decision to sever and reserve for future decision the issue of whether the Respondents' failure to bargain about the terms and conditions of employment for striker replacements violated Section 8(a)(5) of the Act. In my view, sufficient time has passed while this case has been pending review before the Board for a decision to be made on all issues raised by the parties. This particularly includes the significant unfair labor practice issue which my colleagues today defer to an indefinite future date. I would decide the striker replacement issue immediately, along with all other issues presented. Since my colleagues have decided not to follow this course, I have no choice but to set forth my view on the striker replacement bargaining issue in advance of their decision.

In accord with my previous statements on this issue, ¹ I would overrule Board precedent, particularly including *Service Electric*, 281 NLRB 633 (1986), ² and impose on the parties the same bargaining obligations for striker replacements as for any other unit employees. Accordingly, I would reverse the judge to find that the Respondents violated Section 8(a)(5) of the Act by failing to bargain before setting new terms and conditions of employment for striker replacements.

As a general rule, "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) as much as does a flat refusal." NLRB v. Katz, 369 U.S. 736, 743 (1962) (footnote omitted). This rule would normally include the entire collectivebargaining unit, which at any one time consists of the total number of nonstrikers, strikers, returning strikers, and striker replacements.³ In Service Electric, however, the Board reaffirmed an exception to the general rule by adopting a judge's decision holding that there is no obligation to bargain concerning the terms and conditions of employment for striker replacements, and there is no obligation to rescind those terms and conditions upon conclusion of a strike.

Although Board precedent has varied considerably in addressing this issue, two primary reasons have emerged

¹ Chicago Tribune, 318 NLRB 920, 928 fn. 30 (1995) (Chairman Gould and former Member Browning would overrule Board precedent regarding absence of obligation to bargain).

² Contrary to one argument advanced by both the General Counsel and the Charging Parties, there is no practical or legally viable basis for defining an employer's bargaining obligation by reference to the economic or unfair labor practice nature of a strike.

³ See *National Upholstery Co.*, 311 NLRB 1204, 1210 (1993) (bargaining unit constituents for purposes of determining doubt of majority status).

for the Service Electric exception. First, there is the view "that the ability to set employment terms for replacements is a necessary incident of the very right to hire them in the first place." Service Electric, supra, 281 NLRB at 641. Second, there is a concern about "the inability of a striking representative to bargain simultaneously in the best interests of both strikers and their replacements." Id. (emphasis added). I find neither reason persuasive in support of a broad, per se exception from the general obligation to bargain.

The concern for an employer's right to replace strikers derives, of course, from the dictum in *NLRB* v. *Mackay Radio*, 304 U.S. 333 (1938), that:

[A]n employer, guilty of no act denounced by the statute, has [not] lost *the right to protect and continue his business* by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

Id. at 345–346 (emphasis added).⁴

The *Mackay* doctrine itself speaks to issues of prohibited and permitted forms of discrimination between those employees who support union strike activity and those who do not support it. See also *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). The doctrine does not directly address the issue of statutory bargaining obligations owed to the collective-bargaining representative of both groups of employees. The *Mackay*-based rationale for excusing an employer from bargaining about striker replacements' terms and conditions of employment, however, stems from the notion that to require bargaining "would be to nullify the [employer's] right to hire replacements." *Times Publishing Co.*, 72 NLRB 676,

684 (1947).⁵ In other words, the Board feared that a union could obstruct or veto the hiring of replacements if it had the right to demand bargaining about the terms and conditions offered to them.

This notion is fallacious. First, the only bargaining exemption reasonably implicit from Mackay Radio is that an employer does not have to bargain with a collectivebargaining representative about the decision to hire striker replacements and the decision to offer employment on a permanent basis. Second, an employer does not have to bargain concerning the terms offered to replacements if it merely offers to employ them on the same terms and conditions as applied to those strikers whom they replaced. Third, if the Service Electric exception was merely meant to protect an employer's Mackay right to hire replacements, there should be some requirement of proof that different terms and conditions of employment offered to striker replacements are necessary to attract or retain them. There is no such requirement under Service Electric.

Based on the foregoing, a union clearly would not possess veto power over the hiring of striker replacements even if it had the general right to demand bargaining about different terms and conditions of employment for the replacements. Service Electric's exaggerated concern for an employer's Mackay right imperils both the statutorily protected right to strike, and, ultimately, the stability of collective-bargaining relationships. Indeed, the failure to give sufficient weight to the statutory right to strike contravenes the Supreme Court's recognition that "this repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collectivebargaining system." NLRB v. Erie Resistor Corp., 373 U.S. at 233–234.6

I repeat that the *Service Electric* rule does not require an employer to prove the particular terms and conditions of employment offered to striker replacement are necessary to attract and retain a sufficient number of replacements. It also does not require an employer to reinstate prestrike terms and conditions of employment upon termination of the strike. Consequently, the exemption from bargaining under *Service Electric* goes far beyond the right to continue operations during a strike, as assured by *Mackay*, and permits an employer to secure

⁴ Although dictum in the first instance, there can be no doubt that the Mackay doctrine applies with the full force of law. See Trans World Airlines v. Independent Federation of Flight Attendants, 489 U.S. 426, 433 (1989), and cases cited there. While I disagree with Mackay Radio, the Board's duty is to enforce the law as it has been defined by the United States Supreme Court. See Gould, Agenda at 192-193. As I have said elsewhere, "if there is to be a different result, it must come from the President and the Congress and not the Board." Leslie Homes, Inc., 316 NLRB 123, 131 (1995) (Chairman Gould concurring in the Board's finding that the Supreme Court's decision in Lechmere v. NLRB, 502 U.S. 527 (1992), creates no distinction between organizing activity and area standards activity in determining the access rights of unions to an employer's property), and [Teamsters Local 443 (Connecticut Limousine Service)], 324 NLRB [633] (1997) (Chairman Gould dissenting from the Board's conclusion that it can remand the chargeability of organizational expenses to dues Beck objectors consistent with Ellis v. Railway Clerks, 466 U.S. 435 (1984)).

⁵ In *Service Electric*, 281 NLRB 633, 637–641 (1986), the administrative law judge correctly held, despite several instances where the Board had meandered, that the Board had never expressly overruled its decision in *Times Publishing Co.*, 72 NLRB 676, 684 (1947), that employers were not obligated to bargain over replacements' working conditions.

⁶ As I have stated elsewhere, "the idea . . . is that resort to economic strife and the presupposed infliction of pain—and especially the threat of such conduct—will induce parties to reassess their positions and to compromise." W.B. Gould IV, *Agenda for Reform* 184 (MIT Press 1993).

permanent, advantageous changes not reasonably contemplated by its proposals in collective-bargaining negotiations. If most or all of the regular bargaining unit employees strike in support of their union's bargaining demands, an employer can permanently replace them and impose sweeping, permanent changes in terms and conditions of employment. Service Electric therefore creates a powerful incentive for employers to precipitate and prolong a strike in order to institute wholesale unilateral change. Such an incentive cannot possibly be justified by the Mackay doctrine or reconciled with the Board's statutory mandate to foster labor relations stability through the encouragement of collective bargaining.

The scope of unilateral change permitted a struck employer under *Service Electric* stands in marked contrast to the scope of change permitted a struck carrier under the Railway Labor Act. Voicing the same concerns expressed above about abnegation of the collective-bargaining process, the Supreme Court has strictly limited a struck carrier's right to make changes in existing negotiated terms and conditions of employment:

Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit op-

⁷ As the Court of Appeals for the District of Columbia recently said: Provocation [of strikes by employers] would be undesirable because "[s]uch tactics might poison the atmosphere more than a candid resort to a lockout and might also create bargaining gaps that might otherwise be avoided in the bargaining process," Id. at 769 (quoting Bernard D. Meltzer, The Lockout Cases, 1965 Sup. Ct. Rev. 87, 104-105) (alteration added). The requirement of good faith bargaining under the Act does provide some constraint on an employer's ability to adopt this strategy. See, e.g., Land Air Delivery, Inc. v. NLRB, 862 F.2d 354, 357-58 (D.C. Cir. 1988) (employer has duty to bargain before implementing permanent subcontract because "permanent subcontract diminishes the bargaining unit by the scope of the subcontract"), cert. denied, 493 U.S. 810 (1989). Nevertheless, an employer might attempt to provoke a strike while going to the edge of what counts as good faith bargaining. As we stated in Boilermakers, "there is no reason to create an incentive for an employer artfully to precipitate a strike."[858 F.2d at 76869.] International Paper Co. v. NLRB, 115 F.3d 1045, 1051

⁸ In resolving issues common to both the Railway Labor Act and the NLRA, policy developed under one statute is not always dispositive of the other. See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) ("[e]ven rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes"). Still, RLA policy has frequently been dispositive of a common issue under the NLRA. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Communication Workers v. Beck*, 487 U.S. 735 (1988); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). See also, [*Teamsters Local 443 (Connecticut Limousine Service)*], 324 NLRB 633 (1997) (Chairman Gould dissenting).

eration on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it.

In light of these concerns, the Supreme Court held that a struck carrier could:

[M]ake only such changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation. The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it. ¹⁰

As indicated in the final sentence above, a rail carrier has an express *duty* under the Interstate Commerce Act to make all reasonable efforts to continue its operations during a strike. A private employer under the National Labor Relations Act has merely a nonstatutory *right* from *Mackay* to continue operations. It is inconceivable to me that the scope of unilateral change permitted a struck employer for its replacement work force should be so much broader in the latter situation than in the former. ¹¹

⁹ Railway Clerks v. Florida East Coast Railway Co., 384 U.S. 238, 247 (1966).

¹⁰ Id. at 248. I note that the carrier in *Florida East Coast Railway* conceded that its authorization to make changes terminated at the conclusion of the strike. 384 U.S. at 247 fn. 7.

¹¹ While there is a difference between the RLA and the NLRA in that an RLA employer must justify a departure from the norm set by the collective bargaining agreement and the NLRA employer need not do so, I fail to see how that difference has any bearing on the obligation to bargain. It seems to me that it only indicates that the NLRA employer has more latitude as to what it can present as bargaining proposals and not that it has less of an obligation to bargain than does the RLA employee. Indeed, the RLA prescription against unilateral changes as to terms and conditions of employment is one of those many areas of law where the Supreme Court has incorporated RLA standards into the NLRA. See, e.g., Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964), where the Court in examining the very first consideration that it utilized in defining the duty to bargain and terms and conditions of employment explicitly and exclusively relied upon an RLA decision, Order of Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 (1960). Thus, RLA principles are persuasive for the proposition that the Board should depart from erroneous NLRA precedent. Beyond Fibreboard itself, the federal courts, while acknowledging differences between the two statutes, have long used NLRA and RLA precedents in construing the duty to bargain under the corresponding statute. Chicago & N.W.R. Co. v. Transportation Union, 402 U.S. 570, 574-575, 578-579 (1971) (drawing parallel between NLRA duty to bargain in good faith and RLA's duty to exert every reasonable effort); NLRB v. American National Insurance Co., 343 U.S. 395, 402 fn. 8 (1952) (comparing RLA as similarly forbearing from governmen-

The second reason for the *Service Electric* exception posits the existence of an insurmountable conflict of interest when a union must bargain simultaneously about both strikers and replacements. The "conflict of interest" terminology is misleading. It does not mean that a collective-bargaining representative is prohibited from representing both groups. On the contrary, a collective-bargaining representative has a statutory duty to represent all employees in a bargaining unit, including non-members and those who disagree with any or all of the union's actions. When fulfilling this duty in contract negotiations, a union's proposals will often conflict with the interests of some part of the represented unit. There is nothing inherently insurmountable about this.

Service Electric, however, presumes that there is a such a chasm of interests between strikers and their replacements that no collective-bargaining representative can bridge it in bargaining about the terms and conditions of employment for the latter. Central to this presumption is the belief that:

Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job. It is understandable that unions do not look with favor on persons who cross their picket lines and perform the work of strikers. 12

The Board has apparently presumed both that unions will inevitably seek to oust replacements and return former strikers at the end of a work stoppage, and that replacements know this and will oppose their union representatives because of it. Accepting for a brief moment the validity of both presumptions, the ultimate focus in the conflict of interests would seem to be on job retention. Service Electric, however, does not remove this issue from the bargaining table on the premise that the union cannot or should not negotiate for both strikers and replacements. Strike settlement negotiations are an important feature of the collective-bargaining process, Retail Clerks v. Lion Dry Goods, Inc., 369 U.S. 17 (1962),

tal regulations of wages, hours, and working conditions); IAM v. Transportes Aereos Mercantiles, 924 F.2d 1005, 1009-010 (11th Cir. 1991) ("Our interpretation of the [RLA's] duty to bargain in good faith is also supported by an analogy to cases interpreting the [NLRA]"). See B. Meltzer, "The Chicago North Western Case: Judicial Workmanship and Collective Bargaining," 1960 Sup Ct. Rev. 113, 126 fn. 58 ("Despite . . . differences, the problem of delineating the duty to bargain, under the RLA, is in its broad outline substantially similar to the corresponding problem under the NLRA.") Furthermore, the Board itself has discussed the duty to bargain under the RLA in construing what subjects are mandatory under Section 8(d) of the Act. Johnson-Bateman Co., 295 NLRB 180, 184 fn. 21 (1989) (drug and alcohol testing); Otis Elevator Co., 269 NLRB 891, 893 fn. 5 (1984) (decisions affecting scope and direction of business), overruled in Dubuque Packing Co., 303 NLRB 386 (1991). Of course, my view is that both Otis Elevator and Dubuque Packing were incorrectly decided. Q-1 Motor Express, Inc., 323 NLRB [767] (1997) (Chairman Gould concurring).

¹² Leveld Wholesale, Inc., 218 NLRB 1344, 1350 (1975).

and unions engaged in such negotiations may legitimately demand reinstatement of strikers in preference to replacements. *Portland Stereotypers' Union 48*, 137 NLRB 782 (1962). See also *Bio Science Laboratories*, 209 NLRB 796 (1974). Cf. *Belknap v. Hale*, 463 U.S. 491 (1983); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987); *Target Rock Corp.*, 324 NLRB [373] (1997). Instead, *Service Electric* removed from the scope of bargaining almost everything relevant to the terms and conditions of employment for replacements *except* the ultimate divisive issue of their job retention.

At this point, it is worthwhile asking whose interests the Board means to protect under *Service Electric*. If it means to save a collective-bargaining representative from itself, by precluding the possibility of disserving replacements in negotiations with an employer, how then can it permit negotiation over the job retention issue? If the Board means to protect the replacements' interests, how does it do so by subjecting virtually all of their terms and conditions of employment to the unilateral action of an employer rather than to a bargaining process where a union must meet its statutory duty to represent them fairly, even if it dislikes them and legitimately seeks their removal at the end of the strike?

Returning now to the dual presumptions underlying the conflict of interests rationale for the *Service Electric* exception from bargaining, I find no sufficient basis for either. In assessing evidence of continuing majority support for a collective-bargaining representative, the Board itself now holds that it will not presume replacements' union sentiments. *Station KKHI*, 284 NLRB 1339 (1987). In *NLRB* v. *Curtin-Matheson*, 494 U.S. 775 (1990), the Supreme Court upheld the no-presumption rule but struggled to reconcile it with *Service Electric*. It noted that:

[U]nions do not inevitably demand displacement of all strike replacements. . . . [A] union's demands will inevitably turn on the strength of the union's hand in negotiations. A union with little bargaining leverage is unlikely to press the employer—at least not very forcefully or for very long—to discharge the replacements and reinstate all the strikers. Cognizant of the union's weak position, many if not all of the replacements justifiably may not fear that they will lose their jobs at the end of the strike. They may still want that union's representation after the strike, though, despite the union's lack of bargaining strength during the strike, because of the union's role in processing grievances, monitoring the employer's actions, and performing other nonstrike roles. Because the circumstances of each strike and the leverage of each union will vary greatly, it was not irrational for the Board to reject the antiunion presumption and adopt a case-by-case approach in determining replacements' union sentiments.

Moreover, even if the interests of strikers and replacements conflict during the strike, those interests may converge after the strike, once job rights have been resolved. Thus while the strike continues, a replacement worker whose job appears relatively secure might well want the union to continue to represent the unit regardless of the union's bargaining posture during the strike. Surely replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union.¹³

Although the Supreme Court found that the nopresumption rule was "not irreconcilable" with Service Electric, the foregoing analysis completely undermines the conflict of interests rationale for a broad, per se exclusion of replacements' terms and conditions of employment from the general statutory duty to bargain. The Supreme Court did not even exhaust the list of strike and poststrike variables that weigh against any presumption of an insurmountable conflict of interests. Most notable is the fact that in many strike situations, including unfair labor practice strikes, all former strikers do not seek to return to their jobs. Even when they do, each former striker's return does not require or inevitably result in a replacement's departure. Not only might the prospect of continued poststrike employment temper the attitudes of replacements towards union representation, as the Supreme Court observed, but it might also temper the attitudes and bargaining posture of union representatives toward them. Those representatives can reasonably foresee that their continued majority support may depend on advancing the interests of replacements in bargaining about their wages and benefits.

Service Electric, however, prevents a union from proving its value to the replacements by bargaining on their behalf. By precluding, rather than permitting, bargaining about striker replacements' terms and conditions of employment, Service Electric actually exacerbates any conflict of interest confronting a collective-bargaining representative. It artificially bifurcates the unit, facilitates the establishment of a two-tiered system of wages and benefits, and undermines a union's ability to serve as statutory representative for all unit employees.

In sum, I find that *Service Electric* rests unsteadily on an unwarranted extension of the *Mackay* doctrine and on inapposite, discredited presumptions about the sympathies of striker replacements and the ability of a union to represent them. In my view, the Board, when it does address this issue, should overrule *Service Electric* and hew to its statutory mandate to encourage "the practice and procedure of collective bargaining." Service to this

mandate is best paid by requiring bargaining on as many issues arising from the collective-bargaining relationship as possible, not by creating broad exceptions to the bargaining obligation.

My view does not ignore the likelihood that certain strike exigencies may necessitate immediate employer action and excuse it from bargaining in advance with the union. These exigencies may involve certain aspects of striker replacements' terms and conditions of employment. Unlike the broad *Service Electric* rule, however, I would strictly limit any strike exigency exception from bargaining to the duration of a strike and I would require case-by-case proof of the necessity for a particular change. Compare *Railway Clerks* v. *Florida East Coast Railway Co.*, 384 U.S. 238 (1966), discussed infra.

For the foregoing reasons, I would hold that struck employers have the same general obligation to bargain about the terms and conditions of employment for striker replacements as for other unit employees. Since the Respondents have not demonstrated the existence of any strike exigencies that would excuse it from the general statutory obligation to bargain here, I would find that their failure to bargain violated Section 8(a)(5) of the Act.

MEMBER HURTGEN, concurring in part.

I agree with my colleagues in the majority that the "joint bargaining" allegation should be dismissed. However, I do not agree that *Boston Edison* is irrelevant to the disposition of this issue.

In *Boston Edison*, 290 NLRB 549 (1988), as in the instant case, the appropriate units were the separate units represented respectively by the several unions. In both cases, the plan was to negotiate some subjects on this separate-unit basis, and to negotiate other subject(s) on a joint (multiunit) basis. Notwithstanding this element of joint bargaining, the Board clearly stated that this did not change the character of the separate units. As the Board explained:

Although it is well settled that the parties may voluntarily agree to bargain jointly on an other-thanunit basis for certain subject matters and to bargain on a unit basis for other matters, that agreement does not result in two separate units—a broader unit for some purposes and a narrower unit for others. Only one unit covering the same employees may exist at any given time, even if the parties agree to bargain on certain matters on a different basis. (Id. at 553).

The Board went on to hold that the units remained the separate ones. Thus, the union was privileged to withdraw from the joint bargaining, and to insist that all matters be bargained separately. It followed that the employer violated the Act by refusing to bargain on a separate unit basis. Similarly, in the instant case, the separate units remained appropriate notwithstanding the ad hoc arrangement to bargain certain matters jointly. Thus, the

¹³ NLRB v. Curtin-Matheson, 494 U.S. at 790-792.

Respondent remained free to insist that all matters be bargained separately. It follows the Respondent did not violate the Act by doing so.

I also note, along with the majority, that Respondent's withdrawal from multiunit bargaining was not done to frustrate bargaining. On the contrary, it was done to move the negotiations along.

Finally, I agree with the majority that a breach of ground rules for bargaining may be found violative of the bargaining obligation imposed by the Act, if it is done for a bad-faith reason. I would add only that the "ground rule" here concerned the unit in which bargaining was to occur. I view this as different from ordinary "ground rules." As discussed above, if the party's alleged breach consists of insisting on bargaining in the appropriate unit, I would be loathe to condemn that as an unlawful refusal to bargain.

MEMBER LIEBMAN, concurring in part and dissenting in part.

I join with the majority in parts II through V of their opinion. I dissent from their decision in part I involving the joint bargaining issue.

I.

Contrary to my colleagues, and in agreement with the administrative law judge, I would find that Respondent Detroit News Agency (DNA) engaged in bad-faith bargaining, in violation of Section 8(a)(5) and (1), by repudiating its agreement with the Metropolitan Council of Newspaper Unions (the Council) and its six member unions to reserve and bargain jointly about 13 common economic topics after resolution of bilateral single-unit negotiations.

My colleagues in the majority do not dispute the judge's finding, based on credibility determinations, that DNA and the Unions mutually agreed to a joint bargaining format on May 9, 1995. Specifically, they accept his findings that DNA President and CEO Frank Vega, on behalf of DNA, attached no conditions or open-ended qualifications to his commitment to Council President Albert Derey, and that the parties structured their negotiations with this understanding. They also do not contest his findings that by June 15, 1995, DNA unilaterally reneged on its commitment by conditioning its adherence to the joint bargaining format and by raising reserved issues during the first stage of bargaining with the individual unions.

To that extent we are in agreement. Where we part company is over the legal consequences of this conduct. Contrary to the judge, my colleagues conclude that inasmuch as there was no unequivocal agreement by all the parties in advance of the 1995 negotiations to be bound by group action, DNA had a legal duty to bargain only on a single union basis and was free unilaterally to renege on its joint bargaining commitment made in the course of the negotiations. They reject any other basis

upon which to find that DNA engaged in bad-faith bargaining. I cannot accept their conclusions.

While DNA was under no obligation to do so, it none-theless agreed to both consolidated bargaining over economic issues and a two-stage procedure for negotiations. In my view, by failing to honor its commitment, absent mutual consent to modify or abandon it, DNA engaged in bad-faith bargaining. In reaching this conclusion, I take into account the history of bargaining between the parties and the significance of this agreement to the collective bargaining process.

A. In finding a refusal to bargain, the judge relied on Boston Edison Co., 290 NLRB 549 (1988), which extended the rationale of Retail Associates, 120 NLRB 388 (1958), to a multiunion bargaining structure. He concluded that DNA did not timely or unequivocally withdraw from the joint bargaining format. My colleagues in the majority reject the application to this case of the rationale of Retail Associates, which set the rules for withdrawal of a party from multiemployer bargaining. They reason that "an ad hoc agreement to meet on a group basis to consider certain common issues, struck in midcourse of multiple single-union, single-employer negotiations, raises different concerns than those presented in the case of withdrawal from multiemployer or multiunion bargaining relationships where the parties have unequivocally agreed in advance of bargaining that all will be bound by group rather than by individual action."

Although I would not strictly apply the *Retail Associates* rules to this situation, I nevertheless disagree with my colleagues' strict formalistic analysis. My disagreement with my colleagues' analysis stems in part from our differing views of the significance of the parties' collective-bargaining history. There clearly is an established practice of group bargaining among these parties. To fully appreciate the significance of this joint bargaining agreement to the integrity of the established bargaining relationships, some background is necessary.

Prior to 1989, both the Detroit Free Press and the Detroit News each had separate collective-bargaining agreements with the various unions representing newspaper employees in the metropolitan Detroit area. By 1986, both newspapers were losing money. In the spring of 1986, a partnership agreement was entered into between the two newspapers to form DNA under the Newspaper Preservation Act.² Implementation of the

¹ Combining separate bargaining units for multiunit bargaining has long been held a permissive subject of bargaining. *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904 (1986). "[R]espect for the stability of industrial relations imported by the Board's determinations has led to the rule that a party may not be forced to bargain on other than a unit basis." *Oil, Chemical & Atomic Workers* v. *NLRB (Shell Oil)*, 486 F.2d 1266, 1268 (D.C. Cir. 1973). However, "the parties may agree to consolidate units for purposes of collective bargaining." Id.

² That Act provides an exemption from antitrust laws to permit two competing newspapers to merge all non-editorial functions, if one of the two newspapers can demonstrate probable danger of financial fail-

Joint Operating Agreement (JOA) was stayed by court order pending resolution of appeals. Although initially opposed, the unions ultimately gave their support to the JOA.

In November 1989,³ the Supreme Court lifted the stay preventing implementation of the JOA, and the Detroit News Agency, created by the partnership agreement, went into effect.⁴ DNA then began joint economic negotiations with all the unions. "The bargaining process adopted can be described as hybrid or a simultaneous two-level process. On one stage or first level of bargaining, those issues related only to individual units were addressed. . . . The economic issues were negotiated at the joint bargaining level." (ALJD at 8.) At the request of DNA and by agreement of the parties, individual and group negotiations took place concurrently.

In 1992, upon expiration of the collective-bargaining agreements, DNA initially rejected the unions' request for a joint economic bargaining process. Then, DNA President and CEO Frank Vega met with Council President Albert Derey. They agreed to negotiate economic issues jointly but, unlike in 1989, not concurrently with the individual bargaining, but after individual bargaining was complete. That year, as in 1989, a collective-bargaining agreement was successfully negotiated, without a strike, utilizing this format.

In 1995, upon expiration of the collective-bargaining agreements, DNA again initially rejected the unions' request for joint economic bargaining. Bargaining began in February. Then, on May 9, Vega and Derey agreed to a two-stage process. Vega initiated the discussion, expressing concern over the slow pace of the negotiations. Derey responded by proposing the two-stage process which the unions saw as essential to a quicker agreement and to provide more bargaining leverage to the smaller unions. Vega agreed.⁵

Single unit negotiations proceeded, focusing on the nonreserved topics. By mid-June, DNA began to inter-

ure. The Free Press applied to be designated as a newspaper in probable danger. Hearings were held, and in August 1988 the Attorney General approved the application.

ject conditions, announcing that unless individual bargaining was concluded by June 30, joint bargaining would not occur. And, it began to raise reserved issues during individual union negotiations. On June 12, Derey asked Vega to confirm their commitment in writing. The letter presented by Vega on June 15 said that joint economic bargaining "would depend upon progress on noneconomic issues. In view of the lack of progress in negotiations and our desire to finish negotiations by the end of the month, we will continue to deal on economic issues individually with each union." Derey vigorously protested that their agreement had no conditions. On July 13, the Unions began what would be a protracted strike against the Detroit Newspapers.

By detailing this background, I do not suggest that DNA was bound to a joint bargaining structure at the outset of bargaining in 1995, or that there was, what the majority terms, a "default practice of group bargaining." Rather, I submit that by 1995, the practice of bargaining jointly, not uncommon in the newspaper industry generally, was a part of the bargaining dynamic at the Detroit Newspapers. Indeed it was an integral feature.

First, the two newspapers consolidated under the Newspaper Preservation Act for reasons of financial advantage. Then, immediately, the newspapers, acting together, initiated group discussions with the Unions. Although the formal details varied, the conceptual framework of joint bargaining and a two-level format was present during the earlier rounds of talks. In practice, the structure for bargaining may not be synonymous with the appropriate bargaining unit. It may encompass not only individual bargaining units but also clusters of units superimposed on each other in a broad system of decisionmaking. The ways in which these units may be combined for negotiating or operational purposes lie largely within the permissive area, giving the parties considerable leeway in their design. Significantly, as was the case here, the relationship among the different types of bargaining units often will vary with the particular issue being considered.

The collective-bargaining structure shaped by DNA and its Unions cannot be equated with any simple notion of the appropriate bargaining unit. It was complex, composed of a multiplicity of units tied together by legal and economic factors. It included the employer partnership (the JOA) pursuant to the Newspaper Preservation Act, the single bargaining units that dealt with DNA, the Guild units that dealt with the two newspapers separately, the Council, and the joint bargaining arrangements used in prior bargaining and undertaken in 1995.

In assessing whether DNA acted in bad faith in unilaterally breaching its commitment to the Unions, we

³ In May 1989, the News and the Free Press, acting jointly as a Publishers' Council, negotiated interim wage increases with the union. Negotiations were conducted with the unions in two groupings. The settlement with one group became the basis for agreement with the other.

⁴ DNA manages all noneditorial functions for the two newspapers. It bargains with several crafts and skilled trades unions. The editorial departments of the News and Free Press remain separate and distinct. The Newspaper Guild separately represents editorial employees at the two newspapers.

⁵ Vega said that the idea had to come from Derey. Therefore, later on May 9, Derey sent Vega a letter, committing to writing the Unions' request that DNA bargain jointly on common economic issues and individually on the remaining issues. The next day, after speaking with Vega, Derey sent him a letter listing the 13 subjects to be reserved for joint economic bargaining to commence upon reaching tentative agreement on non-economic issues. When presented with the letter, Vega acknowledged it was what was agreed to.

⁶ While Vega had not at that point confirmed the agreement in writing, neither had there been any written memorialization of the prior joint bargaining agreements.

should acknowledge this broader structure and past practice. "Surely the Board is not such a prisoner of a narrow interpretation of its own findings concerning appropriateness of a separate bargaining unit that it cannot recognize a workable pattern of bargaining developed by the parties which, while giving due recognition to such separate units, also seeks to accommodate the interests of local and [joint] bargaining." *Radio Corp. of America*, 135 NLRB 980, 983 (1962).

B. I recognize that the Board's approach to structural arrangements has been largely permissive, disclaiming, as the majority does in this case, any role to equalize imbalances of power. *NLRB* v. *Insurance Agents*, 361 U.S. 477, 490 (1960). While I do not disagree, I would not end the inquiry there. For, independent of correcting any alleged imbalance of power, the Board does have a proper role in supervising the process of bargaining and ensuring that the parties live up to their undertakings. That a purpose of the arrangement may have been to achieve strategic advantage does not preclude us from finding that its unilateral repudiation undermined the collective bargaining process in violation of the duty to bargain in good faith.⁷

The Board has found that repudiation of agreements on how to proceed with negotiations violates the duty to bargain in good faith. See *American Protective Services*, 319 NLRB 902, 905 (1995), enf. denied 113 F.3d 504 (4th Cir. 1997); *Natico, Inc.*, 302 NLRB 668 (1991), and *Harowe Servo Controls, Inc.*, 250 NLRB 958 (1980).

Yet, the majority declines to do so here, dismissing the May 1995 agreement as simply an "ad hoc agreement struck in mid-course" on "ground rules for negotiations" and holding that its breach was not inconsistent with good faith. My colleagues decide that DNA was privileged to depart from its prior commitment because it was dissatisfied with the progress of negotiations and sought, not to frustrate, but rather to hasten completion of agreements. In doing so, they elevate form over substance

Both their description of the agreement and their conclusion disregard the importance of the *process* itself to labor-management relations. Collective bargaining is, of course, far more than a transaction of substantive terms. It is a process to identify issues, facilitate the resolution of joint problems, achieve the terms of an agreement, and maintain or restructure attitudes of the parties toward each other. It is "a process that look[s] to the ordering of the parties' industrial relationship." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 485 (1960).

in bad faith." See also *General Electric*, 173 NLRB 253 (1968), enfd. 412 F.2d 512 (2d Cir. 1969), where the parties agreed to commence negotiations early, and the Board found that "they must "conform to the same standards of good-faith bargaining required of parties after the formal contract reopening date." Id. at 258 fn. 30. The Board explained, "[i]t is true that the early meetings were agreed upon to establish the ground work for the more formal negotiations which would follow. . . . But such preliminary matters are just as much part of the process of collective bargaining as the negotiation over wages, hours, etc. In many industries, it has become the general practice of negotiators to meet for 'preliminary' discussions well before bargaining is required. . . . In complicated, multiunit negotiations . . . 'preliminary' discussions have proven particularly valuable." Id. at 257.

I agree with the majority's assertion that collective bargaining must be flexible. But, this is not a case where the union has inflexibly insisted on adhering to procedural rules that are obstructing bargaining. The process here had barely begun when DNA began to retreat, making no attempt to reach an accommodation with the Union on an alternative process. Nor were the Unions using the procedure as a tactic in an overall strategy of delay. Thus, this case is distinguishable from those cited by the majority where insisting indefinitely on the resolution of non-economic issues before negotiating economic issues has been found to violate Sec. 8(a)(5). In neither NLRB v. Patent Trader, Inc., 415 F.2d 190 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (2d Cir. 1970) (en banc); Federal Mogul Corp., 212 NLRB 950 (1974), enfd. 524 F.2d 37 (6th Cir. 1975); nor John Wanamaker Philadelphia, 279 NLRB 1034 (1986), did the parties have an agreement to bargain over noneconomic issues first and economics second. Rather, in each, it was the employer's insistence on its own strategy to so structure the bargaining that was found unlawful. In Adrian Daily Telegram, 214 NLRB 1103 (1974), and South Shore Hospital, 245 NLRB 848 (1979), enfd. 630 F.2d 40 (1st Cir. 1980), cert. denied 450 U.S. 965 (1981), where the parties did agree to a two-stage process, both parties gave the agreed-upon process a significant opportunity to produce results. In Adrian, the parties had 14-15 bargaining sessions during an approximately 4-month period before the mediator suggested that the parties present proposals on all issues. The union complied; the respondent refused persistently for another five months. In South Shore Hospital, the parties bargained for about two months before the employer adamantly refused for the next 6 months to bargain over wages and other economic benefits. In contrast, in this case, the process was barely in place when DNA took steps to undo it.

⁷ Merely because the May 9 commitment involved a permissive subject of bargaining does not preclude us from finding that DNA engaged in bad-faith bargaining by reneging, if its conduct obstructed or inhibited the course of discussions or the negotiation of an agreement. Painters Local 1385, 143 NLRB 678 (1963), enfd. as modified 334 F.2d 729 (7th Cir. 1964) (union failed to bargain in good faith by refusing to execute a written contract containing a permissive term to which it had previously agreed). "The parties did discuss the provision and . . having agreed to [the permissive term], the Respondent may not at the point of executing the written contract refuse to honor its agreement." Id. at 680. In explaining the case, the Supreme Court stated: "The union was required to sign the contract at the employers' request not because Section 8(d) reaches permissive terms, but because the union's refusal obstructed execution of an agreement on mandatory terms." Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 186 fn. 22. Similarly, DNA's refusal to adhere to its agreement, admittedly over a permissive subject, obstructed negotiation of a collective-bargaining agreement that encompasses terms and conditions of employment which are mandatory subjects of bargaining.

⁸ In *Harowe Servo Controls*, the Board found that repudiating an agreement to bargain about and settle noneconomic matters before negotiating economics was evidence of bad-faith bargaining. In *American Protective Services*, the Board found that the respondent engaged in bad faith bargaining by advising the mediator not to count employees' ratification ballots, thereby thwarting the parties' mutual agreement to make ratification, a permissive subject of bargaining, an integral part of the bargaining process. In *Natico*, the company repudiated an agreement to implement on a trial basis during negotiations a proposed incentive wage proposal to enable both parties to assess whether it should be included in a final agreement. The Board found that "[a]s such, it was an agreement by the parties on how to proceed with negotiations" and "repudiation of that procedure . . . constituted bargaining

In 1935, Congress declared it to be the "policy of the United States . . . to encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. Accordingly, "[t]he Labor Act is process-oriented. It establishes and protects the employees' right to bargain, not their right to a bargain." *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 763 (D.C. Cir. 1988).

It is the Board's obligation to protect the process by which employers and unions may reach agreement. Sea Bay Manor Home for Adults, 253 NLRB 739, 741 (1980), enfd. mem. 685 F.2d 425 (2d Cir. 1982). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." H. K. Porter Co. v. NLRB, 397 U.S. 99, 107-108 (1970) (emphasis added). "[T]he Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." NLRB v. Katz, 369 U.S. 736 (1962) (emphasis added).

As the judge found, shortly after agreeing to the joint bargaining format, DNA's negotiators began to retreat from their commitment. Displeased with the progress being made, they began to issue ultimatums, interject conditions, and disregard the two-stage format. Rather than seek the Unions' consent to modify the agreement between Vega and Derey, they shunned any attempt at accommodation. They gave mixed signals of intent that tended to confuse and disrupt the bargaining process (which had commenced and been conducted in reliance on the agreed-to two-stage format) as well as the Union's bargaining strategy. "Respondent's negotiators' shifting and ambiguous reassurances, if not calculated to do so, tended to be disruptive to the Union's approach to and understanding of the bargaining format and, in themselves, constituted evidence of bad faith." (ALJD at 30)

DNA may have been frustrated with the pace of discussions and may have regretted its commitment to reserve bargaining on economic issues until a second stage joint process. I do not second-guess their belief that negotiations were not going as they wished. But, while the process may have achieved quicker results for the parties in their 1992 negotiations, in 1995 DNA barely gave it a chance. "The fountain was poisoned before it ever began to flow." Firch Baking Co. v. NLRB, 479 F.2d 732, 736 (2d Cir. 1973), cert. denied 414 U.S. 1032 (1973).

At the same time, the unions proceeded with the negotiations after May 9 based on their understanding that economic issues would be reserved. We can fairly infer that their individual strategies in stage one were designed in reliance on gaining combined strength when they bar-

gained over the reserved issues in stage two. ¹⁰ These strategies, we can also fairly infer, would have left them in weakened positions when the rug was pulled out from under them and they were required to bargain about virtually all the issues before reaching the combined bargaining stage. My colleagues dismiss any such concerns as simply reflecting shifts in bargaining power that the Board has no business regulating. I would agree if the parties' relative economic strength were the only consideration. But it is not.

At stake was the Unions' justifiable reliance on a commitment, made by both sides, and integral to the bargaining process. The question then is whether DNA must honor its commitment, or may it turn its promises "on and off like water from a tap as it suits their individual interests in the course of an economic struggle to secure a contract." Quality Limestone Products, 153 NLRB 1009, 1031 (1965). DNA, like the Unions, agreed to the two-stage joint bargaining format presumably seeing some potential advantage. As found by the judge, the agreement was unconditional. While the arrangement did not proceed as DNA may have wished, there is, of course, never any guarantee that agreements will yield the intended results or prove effective. Nonetheless, if one party is entitled to abandon commitments, and the other therefore not entitled to rely on them, then there is little incentive to make them. If that is the case, the collective-bargaining process loses integrity. In my view, DNA was not acting in good faith when it unilaterally decided that the agreement was not working out and ceased to honor it.

"The fair dealing which the service of good faith calls for must be exhibited by the parties in their approach and attitude to the negotiations as well as in their specific treatment of the particular subjects or items for negotiation." NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 37 (3d Cir. 1941) (emphasis added). 11 The negotiation process encompasses activities that influence the attitudes of the parties toward each other. How issues are handled affects the overall relationship, and strategies can exert a strong influence on the tone of the relationship. Not only the formal terms but also the fundamental quality of the evolving relations must be determined. While it is not the Board's function to dictate good relations between labor and management, it is within our authority, indeed it is our responsibility, to oversee the process so as to ensure fair dealing which will in turn enhance attitudes such as trust. "The existence of mutual

¹⁰ See *Southwest Portland Cement Co.*, 303 NLRB 473, 478 (1991) (union relied to its detriment on respondent's agreement to bargain separately over absenteeism and tardiness policy).

^{11 &}quot;The presupposition of collective bargaining was the progressive enlargement of the area of reason in the process of bargaining . . . in order to substitute, in the language of Mr. Justice Brandeis, 'processes of justice for the more primitive method of trial by combat.'" *NLRB* v. *Insurance Agents*, 361 U.S. 477, 507 (1960) (Frankfurter, J. concurring) (citation omitted).

trust and confidence between the parties is basic to an effective and harmonious collective-bargaining relationship." *St. Louis Typographical Union 8, ITU*, 149 NLRB 750, 754 (1964) (concurring opinion).

Whether intentionally or not, DNA's "approach and attitude to the negotiations" was inimical to the existence of mutual trust and confidence. Its negotiators did not seek to reach an accommodation with the Unions for a mutually satisfactory alternative. They did not propose a modification of their commitment, they decreed it, completely removing the element of bargaining. Far from hastening the negotiation of agreements, this unilateral attitude and approach could only "obstruct or inhibit the actual process of discussion" (*Katz*, supra, 369 U.S. at 747) and destabilize the underlying relationships. Indeed, by creating a view of the bargaining process that defied accommodation, DNA may have been trapped by its own creation.

I do not argue for a rule that would automatically declare a breach of a procedural or structural agreement *per se* unlawful. I do not seek to enmesh the Board in dictating what parties shall participate in negotiations on a particular subject of bargaining. The parties should be free to work out those arrangements voluntarily. I also do not argue for curtailing the parties' flexibility in negotiating or the latitude allowed them to evolve their own bargaining structure. Nor am I suggesting an approach that would promote inflexibility with regard to bargaining strategies or impose ill-advised regulation of the structure and process of collective bargaining.

To the contrary, I advocate a perspective that encourages opportunities for bilateral, and not unilateral, approaches to bargaining, through which employers and unions jointly attempt, not only to set wages and working conditions, but also to design and structure their negotiations and treat substantive issues at the level most appropriate to effective solution. I have declined to follow what I perceive as my colleagues' strict formalistic approach. Rather, I have considered whether DNA's conduct was compatible with what I understand to be the philosophy of collective bargaining embraced by the Act. In the circumstances of this case, I conclude that DNA's negotiators' unilateral approach, far from achieving the desired flexibility, was more likely to defeat the bargaining process. The other unfair labor practices which my colleagues and I find today, including serious violations of the duty to bargain which we agree led to the protracted strike against the Detroit Newspapers, reinforce my conclusions. Viewed in its totality, DNA's "conduct patently indicates an unusual reluctance to accommodate to the required bargaining relationship and is wholly inconsistent with a genuine desire to reach a mutual accommodation." Borg-Warner Controls, 198 NLRB 726, 728 (1972).

MEMBERS BRAME AND HURTGEN, dissenting in part.

We do not agree that the Respondents violated Section 8(a)(5) by refusing to give the Unions information concerning the Respondents' proposal on exemptions from overtime requirements. As our colleagues state, the Unions' requests focused on the production of a list of employees whom the Respondents believed would be covered by this proposal. However, the Respondents denied the existence of such a list, and the General Counsel never established that such a list existed. Nor did the General Counsel issue a subpoena for such a list. The administrative law judge opined that such a list must exist. But, speculation is no substitute for evidence. And, it is clear that an employer does not have to produce that which it does not have. Accordingly, we would dismiss this allegation for failure of proof.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with the constituent member Unions of the Metropolitan Council of Unions named below as the respective exclusive bargaining representatives for the appropriate bargaining units as described in their respective collective-bargaining agreements, the most recent of which expired on April 30, 1995, by failing and refusing to timely and fully comply with the Unions' requests of October 17, 1995, and January 18, 1996, regarding strike replacement employees that was necessary and relevant to the Unions' performance of their duties as the exclusive collective-bargaining representatives for their appropriate bargaining units.

WE WILL NOT inform employees who were engaged in an unfair labor practice strike which had commenced on July 13, 1996, that they had been or would be permanently replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively with the constituent members of the Unions of the Metropolitan Council of Unions named below as the respective exclusive bargaining representatives for their respective appropriate bargaining units timely and fully complying with the Unions' requests of October 17, 1995, and January 18, 1996, regarding strike replacement employees that was necessary and relevant to each of the following Unions' performance of their duties as the exclusive collective-

bargaining representatives for their appropriate bargaining units:

Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL–CIO; Detroit Typographical Union No. 18, Communications Workers of America, AFL–CIO; GCIU Local Union No. 13N, Graphic Communications International Union, AFL–CIO; GCIU Local Union No. 289, Graphic Communications International Union, AFL–CIO; Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL–CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL–CIO.

WE WILL, upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since June 13, 1995.

DETROIT NEWSPAPERS

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with Newspaper Guild of Detroit, Local 22. The Newspaper Guild, AFL-CIO as the exclusive bargaining representative of employees in the appropriate unit by: unilaterally, and without agreement with the Guild, implementing or bargaining to a valid impasse, a merit pay plan proposal or a bargaining proposal concerning the right to assign unit employees to make television appearances without additional compensation; or by failing and refusing to timely and fully comply with the Guild's oral requests of about April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts and criteria of its merit pay plan bargaining proposal; and the Guild's oral request of July 10, 1995, and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, all of whom information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative in the following appropriate bargaining unit:

All employees employed in the Editorial Department of the Detroit News, but excluding confidential employees, guards and supervisors as defined in the Act, and employees of Detroit News Washington, D.C. Bureau, and employees of other departments.

WE WILL NOT remove from editorial offices' bulletin boards customarily reserved for the use of the Guild, and employee mail slots previously allowed for Guild communications, literature and notices posted or placed therein by or on behalf of the Guild.

WE WILL NOT inform employees who were engaged in an unfair labor practice strike which had commenced on July 13, 1996, that they had been or would be permanently replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed under Section 7 of the Act.

WE WILL bargain collectively, on request, with the Guild as the exclusive representative of the employees in the editorial bargaining unit concerning its merit pay plan proposal and all merit raises granted thereunder and its uncompensated television appearance policy proposal for unit employees, and if the Union requests, rescind all merit raises unilaterally granted thereunder and return to the status quo ante, and make whole any of those employees who may have suffered financial loss.

WE WILL timely and fully comply with the Guild's oral requests of April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts, and criteria of its merit pay plan bargaining proposal; the Guild's oral requests of July 10 and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation, including a list of employees it considered to be eligible for such salary; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, including striker replacement employment letters.

WE WILL, upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since June 13, 1995.

DETROIT NEWS, INC.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL—CIO as the exclusive bargaining representative of employees in the appropriate editorial bargaining unit set forth in its expired collective-bargaining

agreement by failing and refusing to timely and fully comply with the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, all of which information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the appropriate editorial bargaining unit.

WE WILL NOT inform employees who were engaged in an unfair labor practice strike which had commenced on July 13, 1996, that they had been or would be permanently replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed under Section 7 of the Act.

WE WILL timely and fully comply with the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, including striker replacement employment letters.

WE WILL, upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since June 13, 1995.

THE DETROIT FREE PRESS, INC.

Amy Bachelder and Linda Rabin Hammel, Esqs., for the General Counsel.

Robert J. Battista and Lynne E. Deitch, Esqs. (Butzel Long), of Detroit, Michigan, for the Respondents.

John B. Jaske, Esq., of Arlington, Virginia, for the Respondents.

Samuel C. McKnight, Esq. (Klimist, McKnight, Sale, McClow & Canzano, P.C.), of Southfield, Michigan, for all Charging Parties.

Duane Ice, Esq. (Miller, Cohen, Martens, Ice & Geary), of Southfield, Michigan, for Newspaper Guild of Detroit, Local 22.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. This case arises from a series of unfair labor practice charges filed against the Detroit Newspaper Agency (DNA), the Detroit News, Inc. (the News), and The Detroit Free Press (the Free Press) by various Unions that had conducted a strike against Respondents from July 1995 until February 1997.

An unfair labor practice was filed in Case 7–CA–37361 by Detroit Typographical Union Local No. 18 (DTU Local 18 or Local 18) alleging that the DNA refused to provide Local 18 with information relevant to bargaining. Subsequently, on July 13, 1995, Local 18 amended their unfair labor practice charge to allege that the DNA had engaged in bad-faith bargaining.

On June 27, 1995, an unfair labor practice charge was filed in Case 7–CA–37385 against the DNA by Detroit Mailers Local Union No. 2040 (Mailers Union or Local 2040); DTU Local 18; GCIU Local Union No. 13N, Graphic Communications International Union (GCIU Local 289 or Local 289); Local No. 372, International Brotherhood of Teamsters (Teamsters Local 372 or Teamsters); and Newspaper Guild of Detroit, Local 22 (Local 22 or the Guild). The charge alleged that the DNA uni-

laterally reneged on its agreement to jointly bargain certain economic topics with the six Unions who filed the charge.

On July 11, 1995, the Guild filed an unfair labor practice charge against Respondent News in Case 7–CA–37417 alleging, among other things, that Respondent News unilaterally implemented a merit pay plan without bargaining to a goodfaith impasse. The charge also alleged that the Respondent News unilaterally implemented a proposal regarding the right to assign employees to make television appearances without additional compensation, without bargaining to a good-faith impasse.

On July 13, 1995, the Guild filed an unfair labor practice charge in Case 7–CA–37427 against Respondent News alleging that the News had unilaterally changed certain working conditions when one of its editors, Christina Bradford, removed certain union literature from a bulletin board in the editorial office.

On August 24, 1995, the Guild filed another unfair labor practice charge in Case 7–CA–37606 against the News alleging that Bradford had unlawfully removed union literature from the mail slots of Guild members.

A complaint and notice of hearing was issued upon allegations in Case 7–CA–37385 on August 23, 1995, and upon allegations in Case 7–CA–37427 on August 31, 1995. On September 13, 1995, an amended consolidated complaint issued upon allegations in Cases 7–CA–37361 and 7–CA–37385.

On October 3, 1995, a consolidated amended complaint issued upon allegations in Cases 7–CA–37427 and 7–CA–37606.

An unfair labor charge was filed in Case 7–CA–37783 on October 17, 1995, alleging the DNA unlawfully threatened to permanently replace unfair labor practice strikers. The Charging Parties included Teamsters Local 372, Mailers Local 2040, DTU Local 18, GCIU Local 13N and the Guild. The charge was amended on November 8, 1995, and again on December 4, 1995.

On December 14, 1995, the Guild amended its unfair labor practice charge in Case 7–CA–37417 to allege that the News failed and refused to provide details of its merit pay plan that the Guild had requested. The charge was again amended on January 16, 1996.

On January 23, 1996, a second consolidated amended complaint issued upon allegations in Cases 7–CA–37361, 7–CA–37417, 7–CA–37385, and 7–CA–37783.

On February 20, 1996, an unfair labor practice charge was filed by the CWA/ITU Negotiated Pension Plan (ITU Pension Plan) in Case 7–CA–38184 alleging that the DNA unlawfully failed to make contributions to ITU Pension Plan on behalf of replacement workers. Similarly, on the same date, Local 2040, Local 372, Local 18, GCIU Local 13N, Local 289 and the Guild filed charges in Case 7–CA–38185 alleging the DNA had failed to bargain with the Charging Parties about the terms and conditions of replacement workers.

A third consolidated amended complaint issued on March 4, 1996, upon allegations in Cases 7–CA–37361, 7–CA–37417, 7–CA–37427, 7–CA–37606, 7–CA–37385 and 7–CA–37783. On April 11, 1996, a fourth consolidated amended complaint issued upon allegations in Cases 7–CA–37361, 7–CA–37417, 7-CA–37427, 7–CA–37606, 7–CA–37385, 7–CA–37783, and 7–CA–38185

Answers denying the allegations set forth in the abovecaptioned cases were filed to the original and amended complaints. The consolidated cases were tried before me on April 15, 16, 17, 29, and 30; May 1, 2, and 3; June 17, 18, 19, 25, and 29; July 9, 10, 11, 29, 30, and 31; August 1 and 2; September 30; and October 1 and 2, 1996, at which time all parties were given full opportunity to adduce relevant evidence. The record, consisting of 3316 pages of transcript, 204 exhibits by the counsel for the General Counsel, 51 exhibits by the Respondents, and 6 exhibits by the Charging Parties, was closed on October 2, 1996. 1

Posttrial briefs totaling over 600 pages were filed by the parties and received at the Division of Judges from Respondent on January 24, 1996, from the Guild on January 27 and from the other Charging Parties and from the General Counsel on January 28, 1996.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of fact and conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings herein are based upon my independent evaluation of the record. Based upon the entire record, the briefs and my observation and evaluation of witnesses' demeanor, I make the following

I. THE BUSINESS OF RESPONDENTS

Respondent Detroit Newspapers is organized as a joint operating agreement partnership pursuant to the Federal Newspaper Preservation Act and under Michigan law. Respondent News, a subsidiary of Gannett Newspapers, Inc., and Respondent Free Press, a subsidiary of Knight-Ridder Newspaper, Inc., are, and have been at all times material herein, copartners doing business for the purposes set forth in the following paragraph under the trade name and style of Detroit Newspapers, formerly known as Detroit Newspaper Agency.

At all material times, Respondent Detroit Newspapers has maintained an office and place of business at 615 West Lafayette, Detroit, Michigan, and has been engaged in the publishing and circulation operations of all nonnews and noneditorial departments of Respondent News and Respondent Free Press as a unified business enterprise as agent for and for the benefit of both newspapers and is responsible for selling advertising, printing, and distribution of the two newspapers.

During calendar year 1994, Respondent Detroit Newspapers, in the course and conduct of its business operations described above, derived gross revenues in excess of \$500,000 and purchased and received at its facilities in the State of Michigan newsprint and other goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan.

At all material times, Respondent News, a Michigan corporation with an office and place of business at 615 West Lafayette, Detroit, Michigan, has been engaged in the operation of the news and editorial departments of a daily newspaper. Dur-

ing calendar year 1994, Respondent News, in the course and conduct of its business operations, derived gross revenues in excess of \$200,000, held membership in and/or subscribed to various interstate news services, published various nationally syndicated features and advertised various nationally sold products.

At all material times, Respondent Free Press, a Michigan corporation with an office and place of business at 321 West Lafayette, Detroit, Michigan, has been engaged in the operation of the news and editorial departments of a daily newspaper. During the calendar year 1994, Respondent Free Press, in the course and conduct of its business operations, derived gross revenues in excess of \$200,000, held membership in and/or subscribed to various interstate news services, published various nationally syndicated features and advertised various nationally sold products.

It is admitted, and I find, that at all material times, each of the Respondents has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

It is admitted, and I find, that at all material times, each of the Charging Unions has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Preface

This litigation arises from the failed successor collective-bargaining agreement negotiation between the owners and management of two metropolitan newspapers of a major American city and six collective-bargaining representatives of about 2500 production, distribution, and editorial employees (i.e., reporters, writers, photographers, clerical), the consequence of which was a strike beginning July 13, 1995, and the hiring of 1500 striker replacements for those 2000 or more employee strikers.

The General Counsel alleges that the Respondents breached their bargaining obligations imposed by the Act by specific conduct during negotiations, including the following: the DNA's June and July 1995 reneging upon individual and joint bargaining agreements and its May 11, 1995 unilateral implementation, absent lawful bona fide impasse, of a proposal which allegedly unlawfully modified a preexisting memoranda of agreement and affected the scope of the unit represented by DTU Local 18; the News' July 5, 1995, unilateral implementations and effectuations of editorial unit merit pay plan and a right to assign to editorial unit employees' unpaid television appearances without having first bargained to a bona fide impasse with their representative, the Guild; the News' April 25, 1995 refusal to comply with the Guild's request for certain information relating to the proposed merit pay plan and proposed overtime exemption plan; the News July 13, 1995 removal of Guild literature from bulletin boards and employee mail slots; the refusal to provide the charging Unions with opportunity to bargain about the terms and conditions of employment unilaterally implemented for striking employee replacements and the refusal from September 11, 1995, to April 1996 to furnish to the Charging Party Unions requested information regarding the employment relationship between Respondent and the replacement employees they had hired. It is also alleged that Respondent interfered with employees' Section 7 rights and violated Section 8(a)(1) of the Act since about August 1995

¹ On April 16, 1996, Local 2040, Local 372, Local 13N, GCIU Local 289, DTU Local 18 and the Guild filed a charge in Case 7–CA–38422 against the Respondent News, Respondent Free Press and Respondent DNA alleging the three Respondents withheld information relating to replacement employees. The complaint was amended by the inclusion of the charge on June 25, 1996. On June 12, 1996, a charge was filed in Case 7–CA–38655 alleging Respondent Free Press unlawfully implemented its merit pay proposal. The matter was consolidated and then severed from the instant case, to be separately litigated at a subsequent date pursuant to agreement of all parties.

by threatening to hire and declaring that they have already hired permanent replacements for striking employees who the General Counsel alleges were engaged in an unfair labor practice protest strike which was caused and/or prolonged by the alleged unfair labor practices. The strike commenced on July 13, 1995, and continued on, at least to the time of receipt of the briefs. There have been nationally published newspaper articles which referred to an unconditional offer to return to work by the striking Unions in mid-February 1997, to the Respondents' offer to reinstate them only to positions that may come open and Respondent's refusal to terminate any replacement employees to provide such position. I have not, however, received any official communication from the parties.

B. Background

The Free Press is a daily newspaper owned by Knight-Ridder, an international information and communications company headquartered in Miami, Florida. The News is a daily newspaper owned by Gannett Co., Inc. (Gannett), a news, information, and communications company headquartered in Arlington, Virginia.

Prior to 1989, each newspaper had separate collectivebargaining agreements with the various unions representing newspaper employees in the metropolitan Detroit area. By 1986, both newspapers were losing money. In the spring of 1986, a partnership agreement was entered between the News and the Free Press to form the DNA under the Newspaper Preservation Act—a Federal legislative enactment that provides an exception to the Federal antitrust laws and permits two competing newspapers to merge all of their noneditorial functions if one of the two newspapers can demonstrate to the Attorney General of the United States that it is in the probable danger of financial failure. The Free Press applied to be designated as a newspaper in probable danger of financial failure. Hearings were held and in August 1988, the Attorney General approved the application. Implementation of the joint operating agreement (JOA) was stayed by Court order until appeals regarding the JOA were exhausted in November of 1989 and the stay was lifted.

Under the partnership agreement, the DNA was created. The DNA is governed by a five-member board of directors; three are appointed by Gannett and two by Knight-Ridder. Its president and chief executive officer is Frank Vega. Its vice president for labor relations is Timothy Kelleher.

The DNA manages all noneditorial functions for the two newspapers. Among the functions it performs are all financial, production, composing, printing, distribution, information systems, human resources, and the marketing for the News and the Free Press. Under the Newspaper Preservation Act, the editorial departments of the two newspapers must remain separate and distinct.

The DNA has four main facilities in the metropolitan Detroit area: two downtown office buildings on Lafayette Street which were originally the home offices of the News and the Free Press; a printing plant in downtown Detroit known as the Riverfront Plant, which prior to the DNA was the main printing facility for the Free Press; and a printing plant in Sterling Heights, Michigan, known as the North Plant, which prior to the DNA, was the main printing facility for the News. The DNA also has approximately 20 distribution centers or circulation warehouses in the metropolitan Detroit area.

The DNA negotiates with several crafts. It bargains with the Local 18 as the representative of composing room employees or printers; Local 289 which represents the photoengravers; Local 13N as the representative of the pressmen, paper handlers and plate makers; Local 2040 which represents mail room employees; the Guild which represents a unit of janitors; and Local 372 which represents two units—an outside unit composed mainly of drivers, district managers and related outside circulation classifications involved in the delivery of the newspapers to carriers and single copy outlets such as racks and stores, and the inside unit which is made up of the clerical employees in the circulation department who handle various circulation clerical functions and customer complaints.

In addition, the DNA bargains with the International Brotherhood of Electrical Workers (IBEW) representing electricians; the International Union of Operating Engineers (Operating Engineers) which represents employees who operate the heating, ventilation and air-conditioning equipment; the Carpenters Union representing carpenters; and the International Association of Machinists (Machinists) which represents two units—garage mechanics who repair company vehicles and machine mechanics who repair the printing presses, inserting equipment and various mechanical devices in the two printing plants. The IBEW, the Operating Engineers, the Carpenters and Machinists are collectively referred to as the "skilled trades" Unions.

The Guild separately represents the editorial employees at the News and the Free Press.

Since the creation of the DNA, John Jaske, senior vice-president of labor relations and assistant general counsel of Gannett, has served as the chief spokesman for the DNA in negotiations with the various Unions and also serves as the chief spokesman for the News in its negotiations with the Guild. Timothy Kelleher is chief spokesman for the Free Press in its negotiations with the Guild.

Under the joint operating agreement (JOA), the News and the Free Press each publish separate newspapers Monday through Friday. On weekends and holidays, the newspapers publish under a combined masthead.

C. Case 7–CA–37385—Joint Bargaining (Complaint Paragraphs 18–20)

1. Facts

a. Pre-1995 negotiations

In 1986, after the JOA was announced, the News and the Free Press entered into what were called "shadow" negotiations with the various Unions, to try to work out a framework for collective-bargaining agreements in the event the JOA was ultimately approved.

In May 1989, the News and the Free Press, functioning as a publisher's council, negotiated an interim wage increase with the newspaper Unions. In negotiating the increase, the two newspapers dealt with two groupings of Unions—one group, led by Teamsters Local 372, included Mailers Local 2040, the Machinists, the Electricians, the Carpenters, the Operating Engineers, and the Service Employees International Union which at the time represented janitorial employees at one of the newspapers. The other group included the Pressmen, Guild, Photoengravers Local 289, and DTU Local 18. A settlement of a \$22 weekly increase was reached with one group and that settlement became the basis for the agreement with the other group of Unions.

In November 1989, the stay preventing the implementation of the JOA was lifted by the Supreme Court and the DNA went into effect. Under the DNA's interpretation of the Newspaper Preservation Act, it had 10 days from the lifting of the stay to put the Agency into effect. At that point, the DNA, which had made progress in individual negotiations with each Union, entered into joint economic negotiations with all the Unions.² The bargaining process adopted can be described as hybrid or a simultaneous two-level process. On one stage or first level of bargaining, those issues related only to the individual units were addressed. Although the bargaining was commonly referred to as noneconomic, that characterization was not wholly accurate because economic or dollar cost issues peculiar to the individual unit, but unrelated to other units, were negotiated and agreed upon during the individual bargaining stage between the individual Union and the DNA, e.g., commissions as a quid pro quo for concessions. The economic issues were negotiated at the joint bargaining level, e.g., across-the-board wages, designated paid vacations, contract term duration, bereavement leave, holidays, and health insurance.

The individual and group negotiations took place concurrently at the request of DNA and by agreement of the parties. In one set of meetings, the DNA met with the Unions as a group and discussed certain common "economic" issues. In another set of meetings conducted during the same general time frame, the DNA met with the individual Unions and discussed their individual "non-economic" issues. In the midst of the joint negotiations, the Pressmen announced they were taking a "no contract no work" position with the DNA. If they did not have a contract, they would strike the DNA on its first day of operation. The DNA offered the Pressmen a complete package which included a \$30 weekly increase in the first year, a \$30 weekly increase in the second year, and a \$20 weekly increase in the third year of the proposed agreement. The Pressmen ratified the proposal. The DNA then presented the ratified offer to the remaining Unions. An agreement was reached with a minor modification, an additional dollar (\$1) a shift in the second year that was to be used solely for benefit improvements. The DNA then went back and gave the Pressmen the \$1-a-shift improvement for benefits in the second year. A strike was avoided.

The contracts between the Unions and the DNA expired on April 30, 1992. Because of the DNA's perception of difficulty in the issue it sought to raise regarding changes in the product delivery impacting upon unit members, i.e., district managers, bargaining commenced first with Teamsters Local 372 in late 1991 and later with the remaining Unions in January and February 1992.

Initially, in April 1992, the DNA rejected the Union's earlier March request for a joint economic bargaining process and negotiations commenced on an individual basis. After a breakdown in the Teamsters Local 372 negotiations in mid-April, Vega met with Al Derey, the principal officer of Local 372, and, on behalf of the DNA, accepted his proposal to jointly negotiate economic issues but, unlike 1989, not concurrently with individual bargaining but rather to commence after individual bargaining had been completed.³

In the latter part of April 1992, the DNA reached a settlement first with the Machinists and then individually with the IBEW, the Operating Engineers, and the Carpenters. The settlement called for no increases in the weekly wage rate but for a \$1000 bonus the first year of the agreement, a \$1000 bonus in the second year and a \$1200 bonus the third year of the agreement. Once the settlement was reached with the skilled trades, it was publicized to the various printing Unions.

After a tentative agreement was reached on noneconomic issues with the six printing Unions that comprised the Metropolitan Council of Newspaper Unions (Council of Unions), joint economic negotiations began. On April 22, 1992, those Unions presented their proposal. Ultimately, a settlement was reached that provided for lump sum bonuses of \$1200 the first year and \$1000 in each of the second and third year, as well as \$1 a shift for benefits in the third year of the contract.

However, the lump sum bonuses that resulted from joint economic bargaining in 1992 were not the only compensation adjustments that resulted.

In the individual "non-economic" negotiations with Teamsters Local 372, there were several adjustments in weekly wage rates varying from \$20.08 to \$92 weekly. The Pressmen received \$31 weekly in the second year of the agreement. The Mailers negotiated an additional \$700 bonus in the first year of the agreement in their individual negotiations with the DNA in exchange for a reduction in staff sizes or "manning."

In 1992, all negotiations were concluded within a week of the April 30, 1992 contract expiration.

b. 1995 negotiations

As in 1992, the DNA initially rejected the Council of Unions' February 1995 request for the two-stage, 1992 type bargaining process and insisted upon individual negotiations. Thereafter, between February and May 1995, individual negotiations included noneconomic and economic issues.

In late April 1995, the DNA settled with the Machinists. The settlement called for a 4-percent wage increase in the first year of the agreement, 3-percent in the second year, and an additional 3-percent in the third year. The settlement called for the DNA to bear the entire cost of health care if the individual elected coverage under a health maintenance organization ("HMO") but for co-pays of varying amounts, depending upon what the employee earned, if the employee elected coverage under the Blue Cross-Blue Shield program. The co-pay for employees in the prescription drug rider was increased from \$3 to \$7 a prescription. Once the Machinists settled, the DNA achieved identical individual settlements with the IBEW, the Operating Engineers, and the Carpenters. The settlements with the skilled trades Unions were immediately communicated to the other Unions.

Progress in the 1995 negotiations was much slower than in 1992. As of contract expiration on April 30, 1995, the DNA had met several times with the Pressmen over contractual manning provisions which were viewed by the DNA as mandatory featherbedding and artificial overtime. Numerous meetings were held with the Teamsters, but little progress was made. A major issue in the negotiations was the DNA's objective to replace the carrier system with an agent system and the impact such a change would have on district managers. Many other issues remained, including staffing of warehouses, district manager compensation, pensions and single copy commissions. With the Guild janitorial unit, there were only a few prelimi-

² The Guild bargains with DNA only with respect to its janitorial employees. The Guild also represents separate units of editorial employees employed by Detroit News and Detroit Free Press which traditionally receive the same pattern of economic benefits as other unions.

³ Derey also proposed that the parties could mutually agree to bring noneconomic issues into joint economic negotiations.

nary meetings to review the proposals of the parties and no significant progress was made. With the Mailers, the overriding issue was manning. The DNA had opened a \$22 million facility at the Sterling Heights plant to consolidate all of the inserting operations⁴ at one location with robotic and other state-of-the-art equipment. Once the facility opened, it allegedly ran at approximately 50 percent of the level at which the DNA contended that it could operate. Manning was a key issue and little progress was made despite several meetings.

In addition to the foregoing negotiated issues which were individual unit related, the bargaining proposals of the parties during this period of time contained numerous items relating to subjects which the Unions later sought to be reserved for joint economic bargaining. For example, between February and May, GCIU Local 13N made proposals as to term, wages, bereavement, vacation, holidays, military leave, health insurance, life insurance, adoption assistance, stock options and 401(k). Mailers Local 2040 made proposals as to duration, cost of living, health insurance, holidays, bereavement, 401(k), adoption assistance, and military leave. DTU Local 18 made proposals relating to holidays, bereavement, 401(k) and stock option plan. The Guild made proposals for its janitorial unit as to holidays, vacation, wages, life insurance, bereavement, health insurance, adoption assistance, 401(k) and stock purchase plan. GCIU Local 289, made proposals as to holidays, vacation, bereavement, life insurance, health insurance, classified ad discount, 401(k) and stock option plan. During this same period of time, DNA made proposals on duration, cost of living, and health insurance.

Unlike 1992 when the DNA had settlements with all of the Unions in the first week of May, the DNA in 1995 only had contracts with the skilled trades Unions and was far apart with the printing crafts.

On May 9, 1995, Derey made a move to energize the pace of negotiations. The occasion occurred during negotiations at the DNA offices' conference room. During a caucus, Vega encountered Teamsters Local 372 President Dennis Romanowski, a participant in the Guild janitorial unit negotiations. Through Romanowski, Vega invited Derey to Vega's office where the three of them met briefly and where the bargaining format was discussed. Vega commenced by asking the status of negotiations and stating his desire for an early conclusion. Derey responded that it was his "suggestion" that "the parties bargain jointly on economics in the same way they did last time," i.e., the way the preceding contract had been negotiated. Vega told them that Derey's "suggestion was agreeable... but [that] it had to come from [Derey]," and not from Vega

Any doubt as to what had been agreed upon in that May 9 meeting is cleared up by Vega's cross-examination testimony. He conceded without qualification that he had agreed with Derey to proceed to joint bargaining after tentative agreements had been reached with the Unions on individual contract issues;

that certain subjects would be "reserved" for joint bargaining with the Council of Unions, and that those subjects were later identified by Derey in his subsequent letter which was faxed to Vega on May 11, 1995. Vega's cross-examination concession contained no deadline or duration qualification or condition precedent nor condition subsequent to that bargaining format agreement. It dispelled any suggestion of such arguably present in his direct examination testimony that he responded to Derey that "if it will expedite and assist us in moving along, we will agree [to the two-level, 1992 type bargaining format]."

Neither Romanowski's nor Derey's testimony reflected any condition, nor did Derey's letter of confirmation faxed to Vega on May 9. I find their recollection of the specific encounter with Vega on May 9 to be more detailed and more contextual, more compelling, more convincing and more credible than Vega's direct examination account which contains an arguable but tenuous reference to a condition subsequent, i.e., expedition in negotiations. Had such an open-ended qualification been attached to the agreement, any commitment to the two-stage bargaining process would have been terminable at will, illusory and certainly recognizable as such by Derey and Romanowski. Derey, however, perceived that a commitment had been made by the DNA to the two-stage, 1992 type bargaining format, as he immediately publicized the agreement to fellow officers who, in turn, publicized it by flyers distributed to various union memberships as a "significant victory" for the Unions. 6 Derey testified that the Unions' negotiators perceived the two-stage bargaining format as essential to a quicker agreement and that it provided less populous Unions with more bargaining leverage. Local 289 president, Robert J. Ogden, stressed its leverage value to his small unit of 22 members. Other union negotiators explained that attention could be focused and intensified upon individual issues without the burden of simultaneously negotiating broader economic issues common to all six Unions. The smaller Unions would gain in equality and solidarity with other Unions in joint bargaining.

Derey's confirmational letter to Vega committed to writing what he characterized as his bargaining format suggestion but which Vega conceded was an accomplished agreement. The letter further stated, in part:

The above unions would be willing to meet and define what issue would be bargained jointly and as a result, the remaining issues not so defined would be bargained on an individual local level and considered as part of non-economic negotiations.

Following receipt of the letter, Derey called Vega on May 10 to discuss the topics for joint economic negotiations. Derey reiterated the subjects for joint economic bargaining that the six Unions comprising the Metropolitan Council had decided upon at a meeting earlier that day. Vega stated that "it sounds to me like the same as last time" and he asked Derey to send him a letter outlining the subjects. Derey agreed to do so. On May 11, 1995, Derey prepared a letter setting forth 13 subjects "for joint economic bargaining" and presented it to the principal officers of the Unions that made up the Metropolitan Council. The six officers were attending a DTU Local 18 negotiating session at the Detroit News Building at 615 West Lafayette. All signed the letter. Derey then personally delivered the letter to Vega's office. After reviewing the letter, Vega stated to Derey that the

⁴ The inserting machines place the advertising inserts into the Sunday comic section mechanically, forming an advertising package that a subscriber receives with the Sunday newspaper. That advertising package is a large portion of a newspaper's business.

⁵ Vega testified that he had had several other conversations with Derey wherein Derey had persistently requested joint economic negotiations. Although he was not specific as to the May 9 meeting, Vega did not contradict Derey and Romanowski's account of it and, in fact, admitted the thrust of their account which is not essentially disputed.

⁶ A few days later, a copy of the flyer made its way into the files of the DNA's senior vice-president of labor relations, Kelleher.

letter embodied the same issues as previously outlined and noted, as the letter stated, joint economic bargaining will commence after "a tentative overall agreement on non-economic issues." The subjects enumerated in the letter "for joint economic bargaining" are as follows:

- 1. wage increases
- 2. cost of living
- 3. health insurance
- 4. duration of the agreement
- 5. vacation
- 6. holidays
- 7. life insurance
- 8. bereavement
- 9. adoption assistance plan
- 10. military leave
- 11. classified ad discount
- 12. 401(k) savings plan
- 13. stock option plan for both Knight Ridder and Gannett

Thereafter, negotiations proceeded between the DNA and the individual Unions which focused upon critical issues outside the scope of the 13 reserved topics such as manning.

From May 9 to June 15 inclusive, Mailers Local 2040 had seven bargaining meetings with the DNA. During the same period of time, GCIU Local 13N had four meetings and DTU Local 18 had two meetings. Teamsters Local 372 met regularly and frequently with the DNA during this period of time, generally at least once a week. During the same period of time, there were no meetings between the DNA and Local 289. There was no extensive discussion of the reviewed issues; although on occasion the DNA meeting with Local 2040 and Local 13N explicitly referenced one or more of them, it was acknowledged by negotiator Kelleher or Jaske that such topic was to be negotiated at subsequent joint negotiations "if we get there." As to the significant individual issues perceived by the DNA to require priority resolution, there was no agreement.

In late spring 1995, the DNA concluded that because of its perceived low productivity levels at the inserting facility, it would shut down the facility and subcontract the work. Sixty days' notices of the possible closure were given to Local 372 and Local 2040 under the Worker Adjustment and Retraining Notification Act ("WARN"). On about June 1, 1995, the DNA negotiators calculated the Mailers might be enticed to move significantly on manning and productivity issues by informing Local 372 and Local 2040 that it would withdraw the WARN notice and that the contemplated closing of the inserting facility would not take place if the parties made progress in negotiations by June 30, 1995, the day the inserting facility otherwise would have closed.

Both Jaske and Vega testified that they were concerned about the lack of progress in negotiations. The DNA bargaining objective was to eliminate a total of about 150 jobs through attrition and buyouts. Since those jobs averaged \$1000 weekly each, the DNA concluded that it was incurring costs approximately of \$150,000 weekly as negotiations continued. Vega and Jaske testified that they therefore began telling union officials that proposals were going to start coming off the table if negotiations continued past June 30. Some of those proposals

included retroactive wage increase proposals made in individual contract proposals, according to Jaske's testimony, for the purpose of inducing individual contract agreement by June 30. There is no contention by the General Counsel that the DNA insisted upon negotiating reserved economic issues individually prior to mid-June 1995. Jaske's testimony is uncontradicted that no other objection was raised to these references to reserved economic subjects in the course of individual proposal exchanges prior to June 15.8

On June 12, at a Council of Unions meeting, one of the Council members questioned whether the Unions had received anything in writing documenting DNA's commitment to the bargaining process. Derey replied he had not received any such writing nor had he expected a writing. There had been no written memorialization of prior negotiating format agreements. At the urging of a concerned member of the Council, Derey contacted Vega, asking him to send a written confirmation of their agreement. At first, Vega indicated that he had sent such a letter, but discovered that he had not upon searching his files. Pursuant to Derey's request, Vega agreed to confirm the agreement to Derey in a letter.

On either June 14 or 15, Vega hand-delivered a letter dated June 14, 1995, to Derey by Vega, in Jaske's presence, either before or after meeting with the Union's Executive Committee on the Local 372 negotiating team in or near Vega's office, depending upon conflicting recollections of the witnesses. The letter addressed to Derey, drafted by Jaske but signed by Vega, stated:

When we spoke several weeks ago about your desire to bargain economics jointly for the unions who have not yet settled, I told you that issue would depend on progress on non-economic issues.

In view of the lack of progress in negotiations and our desire to finish negotiations by the end of the month, we will continue to deal on economic issues individually with each union. However, if we can finish all non-economics in sufficient time prior to June 30, we will meet jointly.

It is undisputed that Derey became upset and remonstrated with Vega. Derey accused Vega of reneging on their joint bargaining agreement. Vega, who was not rebutted, testified:

And I assured him personally that we would joint bargain once we had completed non economic issues and that I was through this letter re-emphasizing the fact that at the pace we were going we were never going to conclude non economic issues by the 30th and that would complicate negotiations past that point for the reasons I mentioned earlier.

Vega's testimony did not address itself to the apparent consequence of deadline noncompliance with any further clarification.

Derey testified that he told Vega that they had not agreed upon any conditions but that Vega insisted that they had, and that he, in turn, called Vega a liar because he had promised unconditionally to engage in the same two-stage bargaining

⁷ By delaying the contemplated reductions to June 30, 1995, the DNA estimated that it would lose over \$1.2 million in cost saving opportunities.

⁸ See, for example, Jaske's testimony regarding the June 2 DNA proposal to Local 372, sec. 24 of the supplement agreement dealing with wages which was referenced to conditional retroactivity by Jaske in negotiation; and also the DNA June 7 proposal and negotiations with Local 13N. See also the testimony of Local 13N President Howe and also Mailers Local 2040 President Alex Young regarding discussions of an early June reserved wage topic.

format as in 1992. Neither version is inconsistent nor mutually exclusive, and I credit both versions, finding Derey less vague and ambiguous.⁹

Vega testified in cross-examination that the purpose of the letter was for the DNA to achieve a contract by June 30, 1995, so that it could start staff reductions and that the letter was Jaske's idea. Jaske testified that the purpose of the June 14 letter, which had no reference to proposal withdrawals at all, was to "reinforce what we had been telling the Unions," i.e., to complete negotiations by June 30 or the DNA "would start pulling stuff off the table." Both Jaske's and Vega's testimony fails to address the conditional element of progress patently set forth in the letter. Similarly, neither their testimony nor Derey's testimony clearly addressed the reference therein to a "continuation of economic negotiation individually" as a consequence of lack of progress. That sentence is wholly ambiguous. If it refers to individual economic issues peculiar to individual bargaining, then it constitutes a meaningless non sequitur, as such was part of the agreement and not a consequence of a lack of progress. If it refers to subjects covered by the 13 reserved topics which Kelleher agreed were reserved for joint bargaining, then it refers not to extensive give-and-take negotiations but to sporadic instances where such items were almost inadvertently included in a proposal and where the parties quickly acknowledged their reserved status. It would also refer to the above testimony of Jaske regarding his retroactive wage proposals as a stimulus to individual agreement, but which undisputedly were rejected out of hand and were not the subject of serious consideration in a give-and-take bargaining scenario before mid-June. The only possible intelligible interpretation of the second two-quoted sentences is that the DNA will continue bargaining in the 1992 two-stage format but will bargain jointly "if" the June 30 deadline is affirmed.

Respondent, in its brief, apparently abandons the common definition of the word "if," i.e., "in the event," or "on condition."

Respondent argues in brief that the letter is significant for what it does not say. In its brief, the Respondent seriously suggests that the letter does not state that Respondent will only bargain jointly upon compliance with the deadline. I find such argument to be so casuistic as to constitute an intellectual affront. If such guile was in the mind of the author of that letter, I can only conclude that he deliberately calculated to cause confusion at least, and apprehension most likely, in the mind of the reader that the two-stage format would not continue failing a deadline compliance, although in the writer's mind, he could somehow later claim that he did not mean what it purports to say. If that construction urged in Respondent's brief is to be accepted, at best the letter was intentionally misleading and its authorship raises a serious question of the good faith of a negotiator who, in writing, misleads as to bargaining format compliance intent and refuses to clear it up in personal confrontations thereafter.

In any event, even under Respondent's urged interpretation as further argued in the brief, the letter places a unilateral fixed deadline upon its commitment to joint economic bargaining and creates a window whereby it may or may not at its option continue to commit itself to joint bargaining, i.e., it now views itself as having only a limited commitment.

On June 15, 1995, the DNA and DTU Local 18 engaged in a negotiation meeting. DTU spokesperson, Attorney Sam McKnight, and Jaske for the DNA reviewed the status of negotiations. The issue of joint bargaining arose. Jaske testified that McKnight made some kind of reference to the open DNA wage proposal and stated that he thought it was a matter reserved for joint bargaining. McKnight testified that he made reference to a DNA proposal to Local 18 encompassing health care insurance as a matter to be deferred to joint bargaining. McKnight's testimony of Jaske's response is as follows:

[T]he agreement to reserve specific economic items for joint bargaining was only effective if the unions reached agreement in their individual negotiations by June 30 of 1995 . . . the agreement was conditioned on the unions reaching individual negotiation conclusions by June 30 and that the company had always reserved the right to bargain with each union individually all items, both economic and non-economic.

According to McKnight, Jaske went on to assert that he had explained this to Derey several times and had confirmed it in writing and that because of the slow pace of negotiations, the DNA intended to proceed with negotiations of all items, both economic and noneconomic, with each Union. According to McKnight, he protested that it was his understanding and the Local 18 understanding that there was "an unqualified commitment between the Union and the Company to reserve a specific number of designated economic items for joint bargaining."

After a caucus consultation with Derey, McKnight returned to the bargaining table and reiterated the nonconditional commitment understanding.

According to Jaske, when McKnight first expressed his understanding of the bargaining format, he responded that the DNA was dealing individually with the Unions and was trying to resolve individual issues by June 30 or to at least make progress by June 30; and that it was at that point McKnight asked something to the effect of whether Derey understood this was how negotiations were proceeding. Jaske testified that he answered that Derey ought to understand because that has been their discussion up to now. Jaske denied having ever said that the agreement to bargain jointly on economic issues was effective only if the Unions concluded individual negotiations by June 30, nor that he ever said that joint bargaining will take place only if the parties concluded individual negotiations by June 30. According to Jaske, McKnight then asked whether the DNA was prepared to make a wage proposal or had the DNA made a wage proposal. Jaske responded that the DNA was prepared to make the same 4-percent, 3-percent, 3-percent wage progression raise as had been accepted by the five skilled trades Unions but that the DNA was at impasse with Local 18 over the issue of shared jurisdiction over unit work with the graphic designers. After some discussion over that issue according to Jaske, the parties caucused, after which the DNA offered the 4percent, 3-percent, 3-year wage progression. Respondent argues in its brief that such wage offer was "... an individual proposal designed to resolve the jurisdictional issues that separated the parties and was not made in lieu of joint economic bargaining."

McKnight's version of the postcaucus discussion centered about the shared jurisdiction issue with graphic designers, after

⁹ Jaske's account is so cryptic that it does not constitute an effective contradiction of Derey. On its face, it even conflicts with Vega for, according to Jaske, the only thing Vega had said about joint bargaining was that the DNA wanted "to get this done." If there is an inconsistency between Derey and Vega, I therefore credit Derey.

which Jaske made the wage proposal retroactive to the date of the 1992 contract expiration date, conditioned upon completion of a contract by June 30. However, further discussion took place concerning whether they were at impasse over the shared jurisdiction issue, compliance with an arbitration award and compliance with the Memoranda of Agreement involved in a separate issue.

McKnight testified that although he reiterated Local 18's position regarding the two-level bargaining format, he did make an economic wage offer "under protest." He admitted in cross-examination that after Jaske asserted the DNA right to bargain individually what had been reserved for joint bargaining, he did ask Jaske if the DNA were ready to proceed and to make a wage proposal, after which Jaske did make the retroactive proposal.

Respondent argues that Jaske should be credited because minutes compiled for Local 18 by Union Secretary Art Robbins support Jaske rather than McKnight because they reflect no categorical refusal by Jaske to engage in joint bargaining if noneconomic bargaining was not resolved by June 30. Those notes (in evidence as G.C. Exh. 164, p. 1), however, tend to track the sequence of discussion according to McKnight. They state, in part:

McKNIGHT: Is it not correct that health insurance is joint bargaining? JASKE: We gave an end of the month deadline (June 30) for settlement of non-economic bargaining. Possible we may have some joint bargaining—increasingly unlikely will get to joint bargaining by end of the month.

McKNIGHT: Are you prepared to make a wage proposition to Local 18 at this time?

JASKE: Yes.

McKNIGHT: Does (Al) Dere [sic] know about this and does he understand this?

JASKE: He should, has been told many times (by Jaske). Only economic proposal not on table is wages for journeymen and part-timers. We are basically at impasse in these negotiations.

McKNIGHT: (Your offer) of some wage proposal for Local 18—Not willing to accept that as a proposal—Willing to compromise on jurisdiction (proposal #1)—But need a full package.

Indeed, those minutes, although clearly not purporting to be absolutely complete, do not entirely reflect the impassioned rhetoric narrated in McKnight's testimony. The great preponderance of the account deals not with the subject of joint bargaining, but with the jurisdictional issue and Respondent's implementation of its proposal No. 1 regarding the shared jurisdiction issue; and that is the issue which was the major subject of McKnight's ire according to those notes. His references to joint bargaining are much more limited until at the end, the notes reflect the following: McKnight gave DTU Modified Proposal with the comment "a few of these I thought were joint bargaining and will have to talk with (Al) Derey."

[Summation of Local 18 proposal]

JASKE: Think about what I said. Set aside the above mentioned issues—joint bargaining could have come about if all non-economics had been resolved.

McKNIGHT: That's not accurate. Not what agreed to with regards to joint bargaining.

VEGA: If we can get the non-economic TA's done by June 30th, we can get into joint bargaining—that's what I told Derey.

JASKE: If you don't want to continue bargaining, just say so, and then we'll do what we have to do.

McKNIGHT: (re: joint bargaining) You've thrown in a tremendous monkey wrench—you don't just get a little bit pregnant and a month later say I'm not pregnant at all.

VEGA: Not getting the TA's (which supposedly predicates joint bargaining). Did not send letter (to Derey) until today because I wasn't asked to.

The notes thus suggest that at meeting's end, McKnight had not yet talked with Derey as he claimed he had during the caucus. But those notes do reflect an appearance by Vega who admitted on cross-examination that he did discuss the issue of the parties' joint bargaining. He had first testified on direct examination that he was not involved in nor did he appear at any Local 18 negotiations and, although present at the end of the June 15 meeting, he was silent and appeared only as an invited observer.

The minutes also corroborate McKnight's testimony that he objected that the DNA's statement of position regarding joint bargaining was a new disruptive development. The notes support the inference, therefore, that Jaske initially made some disconcerting statement about joint bargaining and not merely the ambiguous reference to some unspecified desire for a contract by June 30, as reflected in the above testimonial account. In fact, it must have been sufficiently provocative that Vega was constrained to make some statement about joint bargaining in an unprecedented appearance at the bargaining table. The notes are clear enough. Vega conditioned joint economic bargaining upon completion of noneconomic bargaining by June 30

In any event, McKnight's testimonial account of Vega's full comments was neither contradicted by Vega nor Jaske. His account of Vega's comments and his response are therefore credited. His testimony is:

Vega said that he was the person who had many conversations with Al Derey, explaining that the company had already reserved the right to bargain all topics including economic topics with each of the unions individually. He said that he had made this clear to Derey in a number of conversations. He said that he had written Derey a letter to that effect. He said that the progress in negotiations with the unions individually was not satisfactory and that the company intended to go ahead and to bargain individually with each of the unions on all topics including the so-called economic topics reserved for joint bargaining.

McKnight thereupon challenged Vega's veracity and insisted to Vega that the parties had "a genuine commitment . . . to reserve common economic items for joint bargaining." McKnight asked the DNA team to reconsider and characterized their new position on joint bargaining as having the effect of throwing a "tremendous monkey wrench into the entire bargaining process between all six Unions and the Company." The

¹⁰ Upon Respondent's objection to improper authentication, counsel for General Counsel limited the sole purpose of the exhibit to reflect Vega's statements at the meeting. However, by citing the exhibit in its brief, I conclude that Respondent does not object to its receipt for the purpose of reflecting what Jaske and McKnight said regarding the joint bargaining issue.

only response he received was from Jaske: "You've got our proposal."

McKnight's testimony is supported by the context of the minutes, and his account of the DNA position on joint bargaining as stated by Jaske is in accord with his uncontradicted and credited testimony of Vega's statement of the DNA position. Accordingly, I credit McKnight and discredit Jaske's denials.

On June 16, 1995, the DNA and Mailers Local 2040 Union met in negotiations. The DNA presented the Mailers Union with a proposal to reduce manning. The proposal referenced a 4-percent increase immediately, a 3-percent increase in the second year and a 3-percent increase the third year, retroactive but conditioned on contract agreement by June 30. The percentage increases were part of an offer to maintain their standard of living while reducing manning over a period of years. At the meeting, Local 2040's president, Young, testified that he referred to the percentage increases and said they were subjects for joint bargaining. Jaske responded that the DNA had agreed to joint bargaining in May but that "there was a deadline, that the deadline was a must, and that they would bargain jointly if we ever got there." Young was not contradicted. In crossexamination, he admitted that the proposals received from the DNA prior to the strike were individual to Local 2040 and that the wage proposal was made in the context of a discussion of manning and work practices, which had been discussed at every meeting and the resolution of which was a condition precedent to joint bargaining. Young admitted that at every other meeting, including one on June 30 and thereafter, when Jaske alluded to wages on a reserved issue such as COLA and when he was reminded that it was a reserved topic, Jaske or Kelleher agreed and said "if we get there."

Jaske testified as to the DNA bargaining with individual Unions. According to him, there was no change in the "fashion" of individual bargaining between May 11 to July 15. He testified that the DNA made economic proposals to expedite resolution of individual issues with Local 372, the Pressmen and the Mailers involving manning, alleged artificial overtime and work-related issues. He testified that wages were regularly referenced, and on occasion health care by the DNA, at which point the Union would remind the DNA that the issue was reserved for joint bargaining to which he or Kelleher irritably responded, "Yes, if we ever get there." The General Counsel argues that as of June 16, the DNA "changed direction."

Young testified that indeed had been the practice before June 16, as Jaske testified, but now Jaske had set a deadline. Respondent argues that Young's testimony is ambiguous because the deadline was not explained, i.e., was it a deadline for agreement conditioning joint bargaining, or was it a deadline for pulling proposals off the table, e.g., retroactive wage increases. Jaske testified that the wage proposal to the Mailers contained in a complete 3-year proposed contract was a quid pro quo for a reduction of Mailers manning costs. He testified that the deadline reference by him was not for overall agreement but only as to the specific quid pro quo proposals.

The General Counsel's next citation of a change in DNA direction is the June 16 negotiation with Local 13N which was led by President Jack Howe. The issues concerned the plate room scale committee. After a caucus, Jaske returned with a 3-year contract proposal which referenced a reserved topic. Howe objected that the topic was a reserved joint bargaining topic. He testified that Jaske stated that if a contract was not obtained by June 30 that

we would have other things to worry about, that there was no progress on non-economics, and without progress on non-economics, we'd never get to joint negotiations, and if we didn't get an agreement by June 30th that they were going to start pulling things off the table and we would end up with something other than agreements.

Upon some prodding by counsel for the General Counsel who asked if the consequences of nonagreement by June 30 were stated, Howe answered, "He said if we could be through with non-economics prior to June 30th, we may enter into joint negotiations." Howe testified that he caucused with his team, returned and responded to Jaske that he "needed to have further clarification on the joint bargaining" because he was unaware of any conditions, to which Jaske said "fine" and the meeting ended. According to Howe, Jaske did not contradict Howe's contention that the DNA was now conditioning the joint bargaining agreement.

Jaske did not explicitly contradict Howe. In cross-examination, Howe conceded that manning constituted the main issue and monopolized the discussions and that on June 7, Jaske had set June 30 deadlines on certain proposals, including union security. From Respondent's viewpoint, Jaske in effect did not set a deadline for joint bargaining but only for pending proposals and merely stated what the parties had agreed upon, i.e., that individual contracts must be agreed upon before joint bargaining would commence. Kelleher drafted longhand notes of negotiation meetings. He is described by Respondent in the record as its "historian" for the issues under litigation. His notes reflect that at the June 16 meeting, Jaske characterized Vega's letter to Howe as purporting to state:

[A]s long as we were making progress we could bargain jointly—we have not made progress & need to be settled by June 30.

If we don't get settled by 6/30 the wage [indecipherable] which is retro to 5/1 would come off as would check off [indecipherable] union security.

We told them that if we get finished early we could have joint bargaining until the 30th [sic].

We don't have issues with many of our unions & need to get this settled. If we pull union security & check off we may not be negotiating jointly.

The General Counsel cites only the first sentence of that notation and not the remainder; which suggests two consequences of agreement by June 30, i.e., no proposal withdrawals and joint bargaining.

By hand-delivered letter of June 17, Derey responded to Vega. Therein, he recited that on May 10, he and Vega had reached a joint bargaining agreement confirmed by his letter of May 11. He characterized Vega's June 14 letter as a "blatant abrogation" of that agreement. He asserted that the Council of Unions had been negotiating since May 10 upon that May 10 agreement understanding that certain designated economic issues would be reserved for joint bargaining and had therefore structured their individual contract proposals upon that understanding. He accused Vega of changing the ground rules and thereby "changing the complexion of negotiations." Derey claimed that the Unions were "severely prejudiced" by that maneuver and threatened to file "appropriate charges" unless the DNA reaffirmed the May 10 agreement. He stated: "We consider your actions sufficiently egregious to support an unfair

labor practice strike." On June 17, Vega faxed a response letter to Derey stating as follows:

As to your letter of today, I told you that we would engage in joint bargaining when all non-economic issues are resolved. As they have not been resolved, the Company has every right to make economic proposals to any union. The union's [sic] have the same right and several have exercised that right as recently as yesterday. Your union, for example, discussed health insurance extensively in several recent meetings.

I cannot imagine how your rights have been prejudiced by both the Company and the Union's exercising these legally protected rights. We continue our willingness to meet with all unions regularly to achieve an agreement as certain of our proposals will expire after June 30.

The June 17 letter thus now asserts clearly the DNA position that it felt free to engage in individual bargaining, including issues the Unions had considered to be reserved for joint bargaining and which, prior to June 15, the DNA negotiators had agreed to "set aside," "put aside," "defer" or "reserve" for future bargaining. Jaske testified that with respect to ongoing negotiations with Teamsters Local 372, he continued through June to make a number of proposals which included some of the topics reserved for joint bargaining and agreed to set them aside for future bargaining when the Union so identified them.

At the next DTU Local 18 bargaining session on June 22, Jaske proposed a complete contract with a 3-year term of annual wage increases to the Union of 4-percent, 3-percent and 3percent, retroactive to May 1 provided the Union ratify a new contact by June 30, and no change in vacations. McKnight testified without contradiction that he told Jaske that since the last meeting, he had done further investigation of the agreement on joint bargaining and that he was "absolutely certain and convinced that the parties had made an unqualified commitment to reserve common economic issues for joint bargaining." He also told Jaske that he was certain that the commitment to certain agreed upon economic items for joint bargaining was an unqualified commitment and he hoped that the DNA would reconsider its position and honor that commitment. According to McKnight, Jaske responded that the Union had DNA's proposal. McKnight again bargained as to reserved subjects "under protest."

Jaske testified merely that they talked about joint bargaining "a bit" and that "we understand that, once the individual issues were resolved, we hoped to be able to get to joint bargaining." Thus Jaske did not effectively nor convincingly contradict McKnight, whom I therefore credit.

In late June 1995, the DNA informed the Unions that the expired contracts could not be extended beyond June 30.

Jaske testified that because of the filing of the unfair labor practice charge and the accusations of the Unions that the DNA had reneged upon a joint bargaining agreement, he drafted and caused to be sent to all six Unions a letter signed by Vega "to reiterate" the commitment to joint bargaining despite assurances, he testified, which had been given during negotiations. Jaske testified that DNA negotiators had never repudiated the desire to engage in joint economic bargaining. In the July 1 letter, the DNA reaffirmed a commitment to engage in joint economic bargaining "when non economic issues are finished with all the unions." However, the DNA asserted that neither it nor the Unions "waived their respective rights to bargaining

individually as they apply to each union," and he asserted that "several unions have bargained on that basis." No specific examples were cited. The letter then stated:

The [DNA] did not waive its right to make final offers on economics to an individual Union or unions based on the individual economic discussions with that Union if the conditions for joint bargaining have not been satisfied, i.e., overall agreements with all unions on non-economic issues have not been reached.

Our proposals to each individual Union have been based on a four percent (4%) increase the first year, three percent (3%) the second, and three percent (3%) the third. When and if we ever get to joint negotiations, the final overall wage package may be greater than, less than or the same as these amounts. The parties have the same rights in joint bargaining as to fringe benefits other than wages.

The letter concluded that the DNA was now concerned that because of the length of negotiations, the continued excessive staffing costs may jeopardize the viability of the 4-percent, 3-percent, 3-percent wage offer.

The July 1 letter had now clearly progressed beyond the common definition of the word "if" to a definition of "reserved" which did not encompass exclusivity, i.e., agreeing to reserve an item for joint negotiations; it did not mean a party would exclusively negotiate that item in joint bargaining. The Respondent now so argues in its brief. Unfortunately for the Unions, they appear to have relied on the common definition of reserve as follows:

1. To save for future use, or a special purpose. 2. to set apart for a specific person or use 11

On July 7, 1995, the DNA met in joint session with the heads of the various printing Unions. The meeting had been requested by the Council of Newspaper Unions. The DNA was represented by Jaske, Vega, Kelleher, and several department heads. The Council was principally represented by Derey, Howe, Attard, Kummer, Young, and Mleczko although every printing Union had a representative present. The meeting took place at 615 West Lafayette in the DNA Academy meeting room. Derey began by saying that the Unions wanted to get negotiations moving and proposed that the parties move negotiations offsite to a hotel, finish up individual negotiations through around the clock bargaining and then move into joint bargaining. The DNA caucused. Its negotiating team had concerns about going offsite not only from the standpoint of cost, but also that it could turn negotiations into a media circus. After the caucus, the DNA representatives expressed their concerns to the Council representatives. The DNA suggested that the Free Press building, which was partially vacant, had lots of meeting rooms and also had Room 100 which was large enough to accommodate the joint negotiations. The union representatives were insistent on their proposal. The DNA representatives caucused a second time and returned. Jaske's accepted Derey's proposal-to go offsite, to bargain around the clock to complete individual negotiations and then to go into joint economic bargaining as had been originally agreed.

Following the meeting, Vega's secretary and Derey's secretary canvassed the area hotels to determine which ones could

¹¹ See Webster's II, New Riverside University Dictionary, Riverside Publishing Co. 1994.

accommodate the parties on short notice. The only hotel that could do so was the Ponchartrain, and negotiations commenced there the following weekend.

On July 10, 1995, the DNA and Local 372 Teamsters engaged in individual negotiations at the Ponchartrain Hotel. In the 41-page counterproposal the Union presented the DNA, the Union used the term "economics," as the DNA had in its summary sheets previously, to designate issues that are to be discussed in joint bargaining. During the negotiations, both sides stated they viewed the agent proposal as a major proposal and a strike issue.

During the negotiations, the parties attempted to resolve the compensation to be paid district managers, which was one of the major issues in negotiations. District manager pay was enmeshed with the agency concept in that if the DNA replaced carriers with agents, the districts would increase in size. The parties discussed keying the guaranteed minimum salary to the average number of papers in the district. On June 15, the DNA had given Local 372 a proposal in which the district manager guaranteed minimum salary was tied to the average circulation in the district. Under that proposal, the DNA proposed an \$828.40 minimum weekly salary for district managers in districts under 3000 circulation; an \$888.40 weekly minimum for districts with a circulation of 600-7000; and \$1003.40 for district managers with a circulation of over 10,000. On July 11, Local 372 countered with a proposal which called for a weekly minimum of \$875.40 for a district manager with a circulation of less than 3000—or a minimum that was 5 percent higher than the DNA had offered; guaranteed weekly minimums of \$1,215.40 to \$1,315.40 for district managers who had circulation ranging from 6001-7000, minimums that were from 36.8 to 48 percent higher than the DNA had proposed; and had an absolute ceiling of 7000 circulation on the size of any district.

On July 12, 1995, Local 372 presented a counterproposal to the DNA that rejected the DNA's revised agency proposal—the key proposal for the DNA—and refused to meet again until the DNA was prepared to counterpropose on district manager pay. The July 12 union proposal was costed out at over \$71 million. Jaske stated he had no further movement, and Frank Kortsch, an attorney who was the spokesman for the Unions, abruptly terminated the discussion.

On July 10, in the final bargaining session with DTU Local 18 before the July 13 strike, in the context of a discussion over the shared jurisdiction issue, Jaske again made a proposal for a 3-year contract with annual across-the-board increases of 4percent, 3-percent and 3-percent that were offered other Unions. Jaske offered the same proposal to GCIU Local 289 whose bargaining committee was also present at the DTU Local 18 bargaining sessions. Jaske explained that the wage increase proposal was no longer retroactive since the June 30 deadline had expired. He said that he was concerned about getting contracts and that he sensed that the Union was concerned that other Unions would do better and offered a "me too" clause to both DTU Local 18 and GCIU Local 289, in case other Unions on the Council did better. After a caucus and further discussion of the jurisdiction issue, McKnight told Jaske that Jaske was mistaken if he thought Local 18 was concerned that another Union would do better than it and that that was the reason negotiations were going slowly. McKnight said that Local 18's real problem was that the Company "had made a solemn commitment to bargaining the economical items jointly with all six Unions." He said that if Jaske was really concerned about progress and getting negotiations back on track, "the one thing he should do right now was to tell us that he would honor that commitment and reserve the common economic items for joint bargaining." According to McKnight, Jaske responded that he wanted the Union to accept his proposal. Jaske testified that he disagreed that the DNA had reneged. According to Jaske, the joint bargaining issue was merely a passing reference in a heated discussion of the "me too" proposal. According to McKnight, it arose several times. McKnight's more precise recollection is more credible than Jaske's summarization.

On July 12, 1995, the DNA held their last meeting with Local 13N. Manning had been the focal point of negotiations throughout June. By July 1, the parties had agreed how many people would staff a printing press, but they had not agreed upon the economic guid pro guo for the reduced manning. On July 12, the DNA presented Local 13N with a complete contract proposal to resolve all the individual issues between the DNA and Local 13N as a last ditch effort to avoid a strike, according to Jaske. The proposal was to buy out manning, work practices and overtime restrictions. Jaske put a value on the proposal and proposed that it apply over a 3-year period. The proposal included a new term, a wage proposal with the 4percent, 3-percent across-the-board wage increases, deletion of cost of living and changes in health insurance. This complete proposal retained the current levels of holidays, bereavement and vacations and was dependent upon ratification by GCIU Local 13N.

Howe testified that up to that point, the DNA had not offered a big enough share of the cost savings. He testified in cross-examination that he considered the July 12 proposal to be an individual economic offer but that no resolution was reached because not enough money was offered to the Union under wages to compensate for manning and work practice concessions. He testified that he stated in negotiations the section on medical benefits, COLAS, funeral leaves, and even wages were topics reserved for joint bargaining and that the DNA negotiations did not disagree and responded, "if we get there." In redirect examination, he agreed that although some economic aspects of the offer were compensation for individual concessions, others were not.

Respondent argues, and Vega and Jaske testified, that at no time during the 1995 negotiations did any representative of the DNA, including Vega and Jaske, refuse to participate in joint negotiations; that neither did the DNA attempt to condition its participation in joint bargaining on anything but the agreed completion of individual bargaining and that joint economic bargaining did not take place because individual bargaining with each Union was never concluded. As late as March 4, 1996, Jaske, in a letter to Howe regarding negotiations with GCIU Local 13N on that date asked whether Howe wanted to negotiate an economic issue peculiar to the unit or "wait for joint council negotiations." The General Counsel points out that the letter was preceded by the unfair labor practice charge.

2. Analysis

The General Counsel alleges and argues that on June 15, 1995, and thereafter, the DNA breached its agreement with the Unions as to the bargaining format by progressively, unilaterally imposing three new conditions, i.e., (1) bargaining progress on noneconomic issues; (2) progress by June 30; (3) optional individual bargaining on hitherto reserved economic issues.

The Respondent denies that it unilaterally modified or reneged upon its agreement to engage in joint economic issue bargaining upon the completion of noneconomic individual bargaining.

The Respondent contends accurately that resulting from the May 9 meeting and ensuing correspondence, there was an understanding between the parties that joint bargaining would take place "as it had in the past and that everyone understood that bargaining on joint economics would take place after noneconomic or individual bargaining with all unions was complete." Both Derey's and Romanowski's testimony did confirm that the joint bargaining format would conform with the preceding negotiation format. Respondent points to prior negotiations where economic subjects were dealt with in individual negotiations and thereby concludes that Jaske's testimony was accurate when he testified that those subjects designated for joint bargaining in 1995 were not reserved exclusively for joint negotiations. However, it is clear from the factual findings above that the preceding individual bargaining dealt with economic issues peculiar to the individual units as, for example, when specific cost concessions were sought by the DNA. Moreover, as found above, the May 1995 understanding of the parties was not entered into qualifiedly or conditionally. The parties initially formed and structured their individual negotiations with such understanding. They also interpreted their understanding to exclusively reserve the 13 designated topics when they "set aside" those items for joint bargaining and, by their conduct, revealed that they understood the word "reserve" to mean what it is understood to mean by its common English language definition. The DNA's new found interpretation of "reserve" would negate the Union's object in entering the agreement and for them, render it meaningless and contrary to bargaining history.

The Respondent argues in the brief that it did not renege upon its agreement by conditioning reserved economic issue joint bargaining upon progress or progress by a certain date. The above factual findings support the General Counsel that such was the clear meaning of the June and July correspondence as well as contemporaneous utterances by DNA negotiators. The ambiguous references to deadlines for individual proposals, and continuing statements that the DNA will bargaining jointly "if we ever get there," do not constitute a clear reaffirmation of the original agreement. If those statements were intended to constitute a reaffirmation, they failed miserably. Moreover, they support the conclusion that the DNA at best was rendering mixed signals of intent that clearly tended to confuse and disrupt the Union's tactics and strategy which were formulated upon the perceived original commitment. Respondent's interpretation of such statements as "if we can finish all non-economics in sufficient time prior to June 30, we will meet jointly" as being significant for what they do not say, i.e., a clear repudiation of joint bargaining, is pure casuistry. As found above, the logical inference to be made from such statements is that joint bargaining will not take place unless the deadline is reached. However, even under Respondent's interpretation that the statement does not necessarily preclude optional joint bargaining, it violates the understanding of an absolute commitment unconditioned by a deadline. By recourse to such shifting and ambiguous statements of intention when it would have been so very easy for these communications industry negotiators to be clear and precise, their good faith is rendered questionable.

Regardless of whether or not Respondent intended or stated an intention to renege upon the bargaining format contention, it argues that as a matter of fact it did not violate the commitment in actual bargaining as it was perceived by the Unions, because it did not change its bargaining conduct despite the correspondence and statements of its negotiators. It argues that the point for joint bargaining was never reached because there never was a conclusion to individual bargaining.

Respondent points to the July 7 joint meeting where it is undisputed that Jaske unqualifiedly agreed to Derey's request to enter around the clock, individual negotiations and, upon conclusion, to commence joint economic bargaining.

Respondent argues that economic offers it had made to individual Unions did not abrogate the commitment it had made to engage in joint bargaining. It argues that it made such economic proposals as it had done in prior negotiations, "to resolve the individual issues the DNA had with each particular union." It cites the DNA standard of living proposal and 4-percent. 3percent, 3-percent wage offer made by Kelleher to Young at the Mailers Local 2040 negotiation of June 13. Young protested that the DNA "could not get credit" for an annual wage increase when they were negotiating strictly individual concessions and Kelleher quickly agreed, saying he understood and promised that the wage proposal would be on the table when they got to joint bargaining. This is cited as one of the proposals Jaske described as an attempt to resolve individual concessionary bargaining before June 15. Respondent relies on Young's cross-examination testimony to argue that Young considered it to be an individual proposal. What Young testified to was in fact a broad acquiescence that Local 2040 received only individual proposals prior to the strike. However, his direct testimony deals with a specific meeting and is uncontradicted that Kelleher quickly withdrew the 4-percent, 3percent, 3-percent proposal, deferring it to joint bargaining. It is therefore inaccurate to characterize Kelleher's wage offer as a serious stratagem to achieve quick agreement.

Respondent cites also the July 12 negotiation of the manning work practices and overtime restriction buyout proposal to Local 13N which Howe considered to be an insufficient buyout offer.

Respondent argues in its brief as follows:

The fact that wage proposals were made in an attempt to buy out unacceptable manning or overtime practices in individual negotiations did not prejudice joint bargaining. If the parties had gotten to joint negotiations—something that never happened because of the failure to reach tentative agreements in individual bargaining . . . —the unions could have negotiated rates that were equal to or greater than those that might have been reached in individual negotiations. Rather than prejudice the unions, it would seem that better agreements reached on economic terms in individual bargaining would have established a floor from where joint bargaining would commence.

The General Counsel argues that after June 14, the DNA pursued a new bargaining strategy by bargaining with each individual Union on all subjects including those received for group bargaining, as is evidenced by Jaske's "bargaining conduct and the terms of proposals made to each of the Unions."

The General Counsel accurately notes that the DNA offers to each Union was the "same basic offer which had been the basis of full and final agreement reached with other Unions, including wages and health insurance," and made with the objective that those offers would form the basis for settlements with the six Unions. The General Counsel correctly notes that

Jaske's testimony, that the 4-percent, 3-percent, 3-percent wage increase offers made to the Unions were not a breach of the joint bargaining agreement, is unsupported by the testimony of any other DNA witness. The General Counsel cites Young's objections and Kelleher's quick acquiescence that the wage offer was a reserved topic. The General Counsel characterizes Kelleher's offer as not an attempt to get quick resolution of an individual issue but rather as "a 'preview' of what it intended to offer, but did not attempt to bargain about the subject."

It is argued, and I agree, that Jaske's subsequent conduct deviated from the Kelleher approach when he "pressed for individual bargaining on all subjects and insisted on individual complete agreements." And further, that "with Jaske's change in strategy the 4%, 3%, 3% wage increases were no longer a 'preview' proposal, they were put on the table as the basis of a full and complete final offer." Respondent conceded that its objective in doing so was to obtain quick individual contracts. It is further argued that the concepts of acceptance and ratification of individual contracts by June 30 "contemplated a complete agreement, inconsistent with the joint bargaining format"; and that Jaske's "insistence on proceeding as he did thus confirms DNA's repudiation of the joint bargaining format." The General Counsel argues further:

Similarly, certain aspects of the offers, such as retroactivity of wage increases, were contingent upon ratification. The only way a Union could receive this benefit, not offered to the Unions as a group, but offered only to a Union individually, would be to abandon the bargaining format agreement to reserve such subjects for joint economic bargaining. And [as conceded by Jaske] had any Union agreed to such a DNA proposal, that Union would have secured to itself a benefit that could not be taken away, without regard to events in the second stage joint bargaining. Again, DNA's conduct here is clearly in contradiction to the concept of the joint bargaining format.

After making the concession, Jaske amended his answer by observing "of course anything could have happened in joint bargaining that could have changed that," i.e., the DNA obligations incurred upon ratification of complete, individual contracts inclusive of wages and medical insurance. He reaffirmed, however, that yes, there could have been an offer and acceptance upon ratification. Respondent argues that there could be no prejudice to the individual Union because joint bargaining might obtain the same or greater economic benefits but not less.

The General Counsel responds to that argument which is based upon the assumption that an individual Union having obtained a complete, final agreement with the DNA could yet participate in joint economic bargaining. The General Counsel contends, and I agree, that such assumption is not supported by the bargaining history of the parties because Jaske never contemplated that a Union would receive the 4-percent, 3-percent, 3-percent wage increases in individual bargaining and then again later in joint bargaining. What Jaske proposed was that if joint bargaining achieved an additional wage increase, that increase would also accrue to the individual Union which had already settled individually on a full contract for a lesser amount, i.e., the "me too" proposals. Thus Jaske proposed no future joint negotiations which included the accepting Union as an active participant because such Union had already achieved a full and complete agreement. In essence, the General Counsel argues that individual negotiations on all subjects for full and complete individual agreements, while yet committing to joint economic bargaining, constitutes a logical contradiction in terms. I agree.

To put it another way, individual bargaining on a complete contract, including reserved subjects, undermines and is divisive to the unity, equality, and solidarity which the Unions hoped and expected to achieve by the concession to joint bargaining. It is not a question of prejudice to an individual Union but rather the loss of bargaining impact of joint bargaining. The General Counsel's position carries the force of logic and common sense

Respondent answers that assuming, arguendo, the proposals for individual full contracts were "more than just an effort by the DNA to reach agreement with the Unions in question on individual issues as a prelude to joint bargaining, it does not mean the DNA violated its duty to bargain." The Respondent at this point comes full circle back to the position discussed earlier, that the agreement of the parties as reflected in correspondence is significant for what it does not contain, i.e., there is no in haec verba prohibition upon the DNA from making acrossthe-board wage proposals to individual Unions to settle individual issues. Respondent argues that there is also no waiver of the DNA of a right "to bargain to a conclusion with the recognized representative of the employees in a particular unit absent the condition precedent to joint bargaining being satisfied," i.e., the "successful completion of individual negotiations with each Union." Respondent argues that absent that waiver, it had "not only the right, but the legal duty to attempt to bargain to an agreement with each Union."

Respondent argues that bargaining in a multiunion format as agreed upon in May 1995 involves a bargaining subject beyond the certified or recognized units and thus falls into an area of a permissive bargaining subject, the breach of which does not violate the Act. ¹²

The General Counsel's position is that the test for validity of Respondent's nonconsensual withdrawal from an agreement for multiunion bargaining is that crafted by the Board for an attempted nonconsensual withdrawal of a party from an agreement for multiemployer bargaining in *Retail Associates*, 120 NLRB 388, 393 (1958). Eventually, the validity of an attempted nonconsensual withdrawal from multiemployer bargaining will be determined upon consideration of whether "adequate written notice [is] given prior to the date set by the contract for modification, to the agreed-upon date to begin the multiemployer negotiations." *Retail Associates*, above at 395. In *Charles D. Bonanno Linen Service*, 243 NLRB 1093 (1979), the Board reiterated the timeliness requirement but referred to the required notice as "unequivocal." ¹¹³

¹² Respondent cited *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904 (1986), for the proposition that in the absence of mutual consent, one party may not insist on a change in the scope of an existing bargaining unit. Respondent also cited *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 185 (1971); *Hertz Co.*, 304 NLRB 469 (1991), for the proposition that there is no culpability for the breach of a permissive bargaining subject agreement. See also *Standard Register Co.*, 288 NLRB 1409, 1410 (1988), and its discussion of the court's analysis in *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615 (6th Cir. 1982).

¹³ Upheld 454 U.S. 404 (1982), with respect to the issue of whether a bargaining impasse justified an employer's unilateral withdrawal from a multiemployer bargaining unit. The Board held that it did not.

Respondent argues that the policy considerations that led the Board to discourage an at-will abandonment of mutually agreed-upon, multiemployer bargaining unit are not present in this case of multiunion bargaining involving eight separate and distinct recognized or certified units with six separate Unions and eight separate collective-bargaining agreements or supplemental agreements. The General Counsel argues that the consideration is the same, i.e., stability in labor relations. The Respondent argues that "the overriding concern of the Board [in *Retail Associates*] was the impact that unrestricted withdrawal would have on the bargaining unit."

The Board stated in Retail Associates, above at 393:

For the Board to tolerate such inconsistency and uncertainty in the scope of collective bargaining units would be to neglect its function in delineating appropriate units under Section 9, and to ignore the fundamental purpose of the Act of fostering and maintaining stability in bargaining relationships. Necessarily under the Act, multi employer bargaining units can be accorded the sanction of the Board only insofar as they rest in principle on a relatively stable foundation. While mutual consent of the union and the employers involved is a basic ingredient supporting the appropriateness of a multi employer bargaining unit, the stability requirements of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multi employer bargaining unit.

I do not read that decision as limiting the concern for stability upon the bargaining unit impact alone, but rather I conclude that the Board's concerns were also the broader stability in the bargaining relationship and labor peace. The Supreme Court, in viewing the Board's rationale, stated: ¹⁴

[1] We agree with the Board and with the Court of Appeals. The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining. At the same time, it has sought to further the utility of multiemployer bargaining as an instrument of labor peace by limiting the circumstances under which any party may unilaterally withdraw during negotiations. . . .

Of course, the ground rules for multiemployer bargaining have not come into being overnight. They have evolved and are still evolving, as the Board, employing its expertise in the light of experience, has sought to balance the "conflicting legitimate interests" in pursuit of the "national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S., at 95, 96 [353 U.S. 87 (1957)].

Moreover, the Board appeared to extend the *Retail Associates*' timely withdrawal to a factual configuration which involved similar hybrid multiunit, multiunion, two-level bargaining arrangements in *Boston Edison Co.*, 290 NLRB 549 (1988). Both Respondent and the General Counsel reach different conclusions as to whether, under the holding in that case, the DNA's withdrawal was timely. The Respondent says it was (assuming it is applicable); the General Counsel says it was not. In that case, the Board held that an employer who

sought to withdraw from such bargaining unit did so in a timely and unequivocal manner.

In Boston Edison Co., the employer historically negotiated individually with three separate locals of the same national union on all issues except pensions. Each union had a separately negotiated and administered collective-bargaining agreement. The employees of the employer in the three separate bargaining units had been covered by one pension plant jointly negotiated between the employer, the national union and their local unions. On December 18, 1985, the employer notified the national union and Local 369 of its desire to terminate the current collective-bargaining agreement and of its intention to review and modify the pension plan. On January 9, 1986, Local 369 requested the employer to negotiate separately with Local 369 on the terms of a pension covering only the production and maintenance employees represented by Local 369. On March 7, 1986, the employer and Local 369 began their individual negotiations. On April 3, 1986, the employer, the national union, and the three local unions met to discuss the pension plan issue. Local 369 announced it would not participate and later filed unfair labor practice charges when the employer refused to bargain pension separately.

The Board first noted the permissive nature of joint bargaining on an "other-than-unit basis for certain subjects," stating:

Further, although parties may voluntarily consent to bargaining jointly on a basis other than the established appropriate unit, neither party may be forced to continue such negotiations. The scope of an established bargaining unit is a non mandatory subject of bargaining that either party may propose changing so long as it does not insist on its proposal to impasse. *Consolidated Papers, supra* [220 NLRB 1281 (1975)]. A party may not be forced to bargain on other than a unit basis. *Shell Oil, supra* [194 NLRB 988 (1972)].

In discussing the question of Local 369's withdrawal from joint bargaining, the Board stated:

Local 369 successfully met the threshold requirements from joint bargaining, as provided in *Retail Associates*, 120 NLRB 388 (1958), and *Evening News Assn.*, 154 NLRB 1494 (1965), enf'd. 372 F.2d 569 (6th Cir. 1967), by giving timely and unequivocal notice to the Respondent of its desire and intention to bargain with the Respondent concerning the pension plan separately from Locals 387 and 386. In the letter of January 9, 1986, to the Respondent, Local 369 specifically notified Respondent of its intention to negotiate a pension plan separately from the negotiations for the units represented by Locals 387 and 386. This notice was unequivocal and was made in a timely fashion as it was given prior to the commencement of negotiations on the pension plan on April 3, 1986. [Ibid. at 554.]

The Respondent argues that even if *Boston Edison* were applicable, which it contends is not, and even if it had withdrawn from the joint bargaining agreement, which it contends elsewhere above that it did not, then such withdrawal was timely because it preceded any joint bargaining. The General Counsel, however, argues, despite the specific language used by the Board referencing prejoint bargaining notice, that the employer's withdrawal was viewed by the Board timely because it in fact preceded not only the start of joint pension plan negotiation but also all negotiations. Accordingly, the General Counsel does not read the *Boston Edison* case as addressing the issue of

¹⁴ Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404, 109 LRRM 2257, 2260 (1982).

¹⁵ The Respondent does not concede its applicability to the type of multiunit bargaining in this case.

whether the notice therein would have been timely had individual negotiation commenced.

I agree with the General Counsel that the Boston Edison case is applicable to the issues herein because it does extend the Retail Associates rationale to multiunion, two-stage joint bargaining agreements. I also agree with the General Counsel's further argument that the facts of Boston Edison are manifestly different from those herein. In Boston Edison, the topic reserved for joint bargaining was a single, isolated, self-contained issue historically bargained about on its own footing. The issues reviewed for joint bargaining by the DNA and the Unions were more numerous and complex. Had they not been reserved, they could have and would have impacted the calculated guid pro quo in the exchange of proposals in individual bargaining. This is precisely why the Unions wanted to reserve those topics for joint bargaining. For example, the Unions wanted to focus upon individual issues and to be unencumbered by the weight and complexity of issues that tended to have a commonality of interest to all units. Given agreements of the DNA, the Unions accordingly entered upon individual bargaining, having forged their strategies upon that commitment given by the DNA. The DNA's dissatisfaction with individual bargaining progress caused them to at first renege on the commitment by unilaterally demanding deadlines and then, in further frustration with the lack of progress, to infuse into negotiations reserved bargaining topics clearly divisive of the agreed-upon, two-stage bargaining process and inherently inimical to its terms.

I agree with the General Counsel that once parties commit themselves to a multiunion, two-stage joint bargaining agreement that the same principles of stability of labor relations underlying *Retail Associates* rationale must apply. Therefore, no party ought to act in derogation of such an agreement except for extraordinary circumstances, not in issue here, or a timely manner by giving adequate and unequivocal notice.

I agree that Respondent's insistent infusion of reserved point topics tended to be disruptive to the bargaining process which had commenced and been conducted in a manner in reliance upon the commitment to the agreed-upon, two-stage format. I conclude that it is not wholly accurate to contend, as Respondent does, that it acted timely because joint negotiations had not yet occurred. The agreed-upon bargaining format formulated in reliance on that commitment had commenced, and withdrawal from that commitment tended to violate the concepts of labor relations stability underlying the Retail Associates rationale for no other reason apparently than Respondent's subsequent dissatisfaction with the progress of negotiations. Further notice was not unequivocal. Respondent negotiators' shifting and ambiguous reassurances, if not calculated to do so, tended to be disruptive to the Union's approach to and understanding of the bargaining format and, in themselves, constituted evidence of bad faith. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraphs 19 and 20 of the fourth consolidated complaint.

D. Case 7–CA–37361—DTU Local 18 Bargaining (Complaint Pars. 16, 21–23)

1. The issue

The complaint alleges:

16. (a) On or about June 17, 1975, Respondent News and Typographical Union No. 18 entered into a "Memorandum of Agreement" which contained, inter alia, job

guarantees and work arrangements, for Unit members of Typographical Union No. 18, which agreement is not subject to amendment except by mutual consent of the parties.

- (b) On or about January 10, 1975, Respondent Free Press and Typographical Union No. 18, entered into a "Memorandum of Agreement" which contained, inter alia, job guarantees and work arrangements for Unit members of Typographical Union No. 18, which agreement is not subject to amendment except by mutual consent of the parties
- (c) On February 16, 1988, Respondent Detroit Newspaper agreed to adopt the obligations of the Memoranda of Agreement described above in paragraphs 16(a) and 16(b), when it began operations.
- 21. On or about May 11, 1995, Respondent Detroit Newspaper, unilaterally and without agreement with Typographical Union No. 18, implemented a bargaining proposal which modified and redefined the scope of the bargaining unit represented by that labor organization and/or which also modified the "Memorandum of Agreement" described above in subparagraph 16(a).
- 22. The subjects described above in paragraph 21 are not mandatory subjects of bargaining.
- 23. Respondent Detroit Newspapers engaged in the conduct described above in paragraph 21 without having reached a valid impasse on the subject with Typographical Union No. 18 and/or without the consent of Typographical Union No. 18.

The proposal in issue was included as item 1 in the DNA's list of demands that initiated negotiations with DTU Local 18 in February 1995. It reads as follows:

Notwithstanding any other provision of this agreement, the jurisdiction descriptions set forth in the contract are non-exclusive. Employees of other departments of the Agency as well as employees of the Detroit News and Detroit Free Press may perform such work as is necessary including, but not limited to in-putting of text and graphics, creation and in-putting of ad, manual or electronic makeup or alteration of add [sic] (whole or partial pages), the inputting of computer program changes and codes, and the makeup of whole or partial pages. Material received from outside concerns will also be processed. To the extent that anything in the main contract is in conflict with this side agreement, this side agreement shall control. (By making this proposal the Agency does not concede that it has previously breached this contract.)

The Respondent DNA argues that it had explicitly adopted only part of the Memorandum of Agreement (MOA), i.e., the job guarantee section. The Respondent further argues that its proposal I was a proposal to change the jurisdiction provision of the expired collective-bargaining agreement, under which the printer's bargaining unit was granted exclusive jurisdiction over, inter alia, certain composing room work performed with computer technology inclusive of video display terminals (VDTs) and scanners for the processing of retail and classified display ads. Respondent's object, it asserts, was to obtain a shared jurisdiction agreement whereby it would be able to assign bargaining unit work to previous nonunit personnel for efficiency and cost savings purposes. For example, it sought the right to assign to nonunion marketing department personnel,

including nonunit graphic designers and salespersons, the right to prepare such ads with computers, which arguably was within the bargaining units' CBA-described work functions. Thus, argues the Respondent, it could respond rapidly to a customer's desire for a proposed ad display and cost estimate by the salesperson's onsite creation of such sample without having to go back through the composing room, i.e., the site of bargaining unit function from where the processed ad is electronically forwarded to the printing plants. Also, the Respondent argues that its marketing personnel could produce so-called speculation ads (spec ads), i.e., ads composed for use in soliciting prospective clients. Respondent's past attempts to do so had resulted in grievance proceedings and an arbitration recognizing the Union's claim to exclusive jurisdiction award, which issued during the course of DTU Local 18 negotiations.

Respondent argues that its insistence upon item 1 was an insistence upon a mandatory subject of bargaining, i.e., the assignment of work, and did not encompass an attempt to change the unit description nor to decrease the number of unit members who were guaranteed "lifetime" jobs under the MOA. Respondent cites for the propriety of its action in bargaining to alleged impasse over proposal 1, DTU Local 18 adamantly opposed as a permissive bargaining subject, the Board's decision in Antelope Valley Press, 311 NLRB 459 (1993). In that case, the Board dealt with the "tensions" that increasingly arise between an employer's desire to adopt new technology by way of assignments to nonunit persons and the scope of the unit where the unit is described by job functions. As the Board pointed out in that case, there are the usual subjects of bargaining which are mandatory and upon which a party is lawfully entitled to bargain to good-faith impasse under Section 8(d) of the Act, e.g., "wages, hours and other terms and conditions of employment." But it noted there are other subjects which are "permissive," i.e., a party may bargain about them it if consents to do so but it may not be compelled to do so, citing NLRB v. Borg Warner, 356 U.S. 342 (1958). The Board observed that the assignment of work is a mandatory bargaining subject, citing Storer Communications, 295 NLRB 72 (1989), enfd. sub nom. Stage Employees IATSE Local 666 v. NLRB, 904 F.2d 47 (D.C. Cir. 1990). However, it recognized that the scope of the unit which does not relate to wages, hours, etc., is a permissive subject. See Newspapers Printing Corp. v. NLRB, 692 F.2d 615, 619 (6th Cir. 1992). The Board noted the past difficulties in past precedent in distinguishing the objectives of bargaining proposals arguably involving both. It therefore adopted a new test in evaluating an employer's bargaining proposal. First, it will "look to see whether the employer has insisted on a change in the unit description." If so, such would adversely affect the "union's right to represent those employees" and would be unlawful. However, if the employer does not do so "but seeks an addition to [the unit description clause] that would grant it the right to transfer work out of the unit," it will be found to have acted lawfully, "provided that the addition does not attempt to deprive the Union of the right to contend that the persons performing the work after the transfer are to be included in the unit," i.e., depending on the circumstance, by way of a unit clarification petition or in an unfair labor practice proceeding involving an 8(a)(5) allegation. See also Taylor Warehouse Corp. v. NLRB, 98 F.3d 892, 902 (6th Cir. 1996); and Chicago Tribune Co., 318 NLRB 920, 924 (1995).

In *Antelope*, the Board found that the record failed to establish that the proposed language was insisted by the employer to

mean that the union "would never be considered members of the unit." It noted that the employer negotiator explained in negotiations the purpose simply to be able to assign work in question "to whomever it wanted, including currently represented employees and even newly hired unrepresented employees." The Board found that even though the negotiator testified that he thought that the nonunit employees to whom the work was assigned would remain outside the unit even after the assignment, it still found no violation because such understanding was never communicated to the union in negotiations.

The General Counsel argues that the DNA negotiator, in effect, did make such representations during negotiations and, moreover, "insisted" that the Union's representation would be limited to the physical confines of the composing room. The General Counsel cites the Board's decision in Bremerton Sun Publishing, 311 NLRB 468 (1993). In that case, the Board rejected the employer's argument that its proposal was merely a work assignment and found merit with the Union's contention that the proposal "assured that the people to whom work was reassigned would not be bargaining unit members" and that the employer was "not going to have to deal with . . . the [U]nion." However, in the final analysis, the Board distinguished the Bremerton facts from Antelope in that even assuming that the employer "might have been willing to accede to a unit clarification proceeding for determining the unit placement of employee to whom what was formerly exclusive bargaining unit work was assigned, the [employer] was clearly insisting that any such placement determination be made according to some standard other than the language of Article 1 [the collective-bargaining agreement unit description]." It therefore found that the employer was unlawfully insisting to impasse upon a proposal which effectively amends the contractually agreed-upon unit description.

With respect to the MOA, the Respondent DNA argues that even if it had adopted the full agreement, it did not, by its proposal, impact the work arrangements provision because the jurisdiction of the Union was determined by the contract which described the unit in terms of job functions over which the Union was given exclusive jurisdiction by that document.

The General Counsel and the Union argue, in essence, as follows. There were two contracts or agreements which bound the DNA—one was the CBA and the other was the MOA. The CBA had expired and the parties were bound to bargain over the mandatory subjects therein. The MOA, however, was ongoing and, like a collective-bargaining agreement, it could not be modified without the mutual consent of both parties and, like a permissive bargaining subject, could one party force the other to bargain to impasses over a proposed modification. The Union cites, of course, one of the leading cases on the subject of mid-term contract modification, C & S Industries, 158 NLRB 454 (1966). The General Counsel cites precedent for the ongoing viability of agreed-upon obligations in agreements which survive the expiration of the collective-bargaining agreement, e.g., Harvstone Mfg. Corp., 272 NLRB 939 (1984), enfd. in part 785 F.2d 570 (7th Cir. 1986), cert. denied 499 U.S. 821 (1986); Capitol City Lumber, 263 NLRB 784 (1982), enfd. 721 F.2d 546 (6th Cir. 1983), cert. denied 465 U.S. 1029 (1984); Public Service Electric & Gas Co., 280 NLRB 429 (1986); and A.S. Abell Co., 230 NLRB 17 (1977). The underlying rationale of all of these cases is found in Section 8(d) of the Act which states, inter alia:

[t]he duties so imposed [by the statute] shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

All cases cited by the General Counsel and the Union deal with obligations derived from an extra contractual agreement of a fixed term, i.e., a fixed period of time which has a beginning and a termination point. No party herein addresses an issue of concern to me, i.e., does the MOA satisfy the definition of a fixed term agreement and, if not, where is the authority upon which to postulate a finding that it is an unfair labor practice for an employer to attempt to renegotiate the term of an agreement that has bound it in perpetuity to certain conditions that become unsupportable in the context of new technology?

The General Counsel and the Union do not discuss the fixed term references in their case citations but merely argue that the MOA, as an ongoing agreement, obliges the Respondent DNA to honor its work arrangement provision which they allege provide for such work as retail and classified display ad composition by VDT and scanner as within the sole jurisdiction of the Union and which precludes the Respondent DNA from insisting to impasse, as is alleged here, upon its modification.

2. Facts

a. Background

Prior to the approval of the MOA in 1989, both the News and Free Press had longstanding bargaining relationships with DTU Local 18, which represented employees known as printers who work in an area known as the composing room and who "make up" the advertisements (ads) and pages of a newspaper. Traditionally involved in making up ads is typesetting, taking various ad components, text, illustrations, graphics, and putting it into final form to constitute a newspaper page, including the final page. The final page is then forwarded to the engraving department where a plate is made for the press.

Over the years, changes in printing industry technology have affected the work of printers. The major changes were first the conversion from hot metal to teletype setting, the advent of cold type from hot type, and computer technology from the 1960s through the 1970s. In earlier years, a reporter would bring his hard copy to the composing room where the printer would process it by operation of a keyboard-controlled device which set it into type. After that, a proof would be made, taken to the proof room to be read, and type could be collated in proper order and then taken to the makeup area where it would be assembled into a complete page by a makeup man. That page would include editorial stories and ads. Upon the introduction of the VDT-scanner technology, the reporters would input their text directly into the system which transmitted it to the composing room electronically and bypassing the printer's function there. 16

Scanner and VDT usage caused printer layoffs in the early 1990's. DTU Local 18 filed grievances under separate labor agreements with the Free Press and the News which led to arbi-

tration.¹⁷ Eventually, agreements were reached with each newspaper, i.e., the MOAs.¹⁸

Both MOAs were identical in most respects. The statement of intent reads:

The Publisher and the Union have engaged in collective bargaining to develop job guarantees and work opportunities, together with immediate and prospective monetary rewards, in return for the removal of past and future reproduction (reset) obligations and the clearance for the Publisher to enjoy the benefits in their composing room of the new technology, including, but not limited to, video display terminals and scanner equipment.

This document represents a collection of settlement terms which shall be made part of the labor contract obligation of the Publisher and the Union.

The MOAs also provided that certain named printers would have "job guarantees" until death or attainment of 65 years of age, whichever occurred first. The MOAs ended the Union's right to the then-existing practice of reproduction or reset work. Each MOA contained provisions entitled "Work Opportunities," which read:

9. WORK OPPORTUNITIES

It is the intent of the Publisher under this proposal to provide meaningful job assignments to those in receipt of job guarantees. The Publisher reserves the right to bring commercial printing assignments into its composing room to satisfy guarantee obligations. Where possible, new equipment not to date utilized in the composing room will be employed to provide further journeyman work opportunities.

The Publisher reserves the right to encourage voluntary transfer to positions outside the ITU unit where such opportunities are compatible with a guarantee holder's' experience and ability without forfeiture of established guarantees.

Section 10, entitled "New Processes," set forth that in return for the lifetime job guarantees and other benefits set forth in the agreements, the parties agreed to certain enumerated items, including the contention of Section 10(a), entitled "Work Arrangements." It is this provision which the General Counsel (and Union) alleges "defined work that was then being per-

¹⁶ The DNA composing room is not a room, per se, but part of the Lafayette facility's third floor prepress area which includes unit and nonunit work.

¹⁷ The jurisdiction of the DTU Local 18-represented composing room employees had been set out in the collective-bargaining agreements in the broadest terms, i.e., "all composing room work." Over the years, the parties negotiated a series of specific exceptions but the broad definition remained.

¹⁸ The News MOA was entered into on or about June 17, 1995. The Free Press MOA was entered into on or about January 10, 1975.

At times, the News MOA is referred to in the record and during negotiations as the MOA of June 18, 1974, although it was executed on June 17, 1985. The 1974 date appears to originate from the fact that the document became part of the collective-bargaining agreement between the News and DTU Local 18, which was effective from June 18, 1974, which date appears on the face of the document. It is clear that the references to the 1974 and 1975 MOAs are the same document. For instance, the arbitrator in the graphic designer arbitration referred to it as the June 18, 1974 Memorandum of Understanding, but witnesses testified that the document executed on June 17, 1975, was the document introduced at the arbitration and specifically identified the document.

formed by printers, and was to continue to be performed by printers." The section begins:

This section will describe the work arrangements of the ITU employee involving the use of scanners and VDT terminals when such equipment is performing composing room work within the jurisdiction of the Union.

Thereafter, following an enumeration of six categories which set forth work functions of composing room work done by printers, the first category reads:

- (1) Operation of Video Display Terminals in the Composing Room.
- (a) All keystroking to be used for typesetting of display ads.
- (b) Use in making up display ads, page makeup, positioning of ads and type and all related steps for completion of page as per dummy layout.
- (c) Updating the text of display ads, proofreading, and making corrections and alterations of display ads.
- (d) The right to utilization of Video Display Terminals by persons outside the bargaining unit for purposes other than composing room work shall not be abridged.

The other categories refer to classified display ads, coding for display ads, wire service and syndicated copy processing as work to be performed by "composing room employees." Section 4(a) provides:

(a) All copy produced on VDT terminals by the News and Editorial Department of the Publisher will be accepted and processed by composing room employees and all scanner ready copy produced or received by the News and Editorial Department of the Publisher, including copy from the Publisher's own bureaus, will either be accepted and processed by composing room employees, or at the Publisher's discretion, may be entered directly into the electronic system for editing on VDT's. Copy received by the Publisher which is not scanner ready or scanner acceptable and which requires minimal editing will be typed or perforated by composing room employees. No typing pool will be created or used to prepare such copy outside the composing room, however, copy which is not typed by employees not covered by this agreement may continue to be typed and made scanner ready before submission to the composing room.

Section A(2)(b) now defined former exclusive composing room employee work as performed by the Classified Department, by nonunit employees, i.e.:

(b) The Classified Dept. may utilize VDT terminals to recall single column classified ads, without borders, cuts or illustrations, from electronic storage in order to correct, add, delete, or kill copy, and also for the addition of necessary coding.

Section 11, the final section, reads:

11. MEMORANDUM TO SUPERSEDE AND EXTEND BEYOND LABOR AGREEMENT, 6–18–74 TO 6–17–77

Any change necessary to make the labor agreement of 6–18–74 to 6–17–77 consistent with the work arrangements agreed to on OCR, VDT's and electronic storage and retrieval will be deemed made. This Memorandum of Agreement shall be ongoing and part of all future collec-

tive bargaining agreements and shall not be subject to amendment except by mutual consent of the parties.

There is no reference in the agreement for any termination date. The job guarantee section by its terms is, of course, limited to the age, death or retirement of hundreds of employees named beneficiaries therein, but there is no terminal date for the work arrangement section which, by the terms of the agreement, would become part of every succeeding contract as constituted unless modified by mutual consent.¹⁹

In "shadow negotiations" that followed the request for the JOA, DTU Local 18 requested the DNA to recognize the Memoranda of Agreement with the News and Free Press, protect the existing pensions and deal with a number of issues that were important to it. The DNA would not then commit itself to the adoption of the MOA.

In the middle of February 1988, a deadline arose for unions to withdraw their opposition to the JOA. On February 15, 1988, Jaske sent a letter to David Gray, president of Local 18, advising him of the deadline and that if the Union failed to withdraw their opposition to the JOA and accept the offers the two newspapers had on the table, then offers would be permanently withdrawn.²⁰

Upon receipt of Jaske's letter, the Union withdrew its opposition to the JOA and signed an agreement with the Free Press and the DNA on February 16, 1988.²¹

Under the agreement, the DNA agreed: "The DNA will adopt the job guarantee agreements of the Free Press and the News when it begins operations."

Jaske testified that he only understood the agreement to pertain to the job guarantee sections of the Memoranda of Agreement and not the entire memoranda. He testified in direct examination that the only issue discussed between the parties in the shadow negotiations was what would happen to the job guaranteed situation holders of the Free Press and the News and what would happen to the nonjob-guaranteed situation holders, and that no other sections of the Memoranda of Agreement were discussed. Respondent argues that it would have been unlawful to adopt all of the provisions of the memoranda, because section 5 in the two agreements dealt with mandatory retirement at age 65—something that was now clearly unlawful under state and Federal law—citing MCLA 37.2202, et seq.; 29 USCA § 623, et seq. Respondent also argues that many of the provisions of the memoranda no longer applied, were obsolete or had already been brought forward into the collectivebargaining agreements.22

¹⁹ There were initially about 700 original job guarantees which were reduced to 400 or 500 by the time of DNA adoption.

²⁰ The Free Press had offered severance benefits, extended medical benefits and counseling services if the Union supported the JOA and despite that support, the Attorney General did not approve the JOA and the Free Press closed.

²¹ The agreement was signed by William Keating on behalf of the unapproved and nonexistent DNA. The document was signed by the Free Press because the newspaper was assuring certain severance and other benefits would result if, despite the support of the Union, the JOA was not approved. The News did not execute the document because it was not making any representations in the event the JOA was approved or disapproved.

²² The newspapers did not have early retirement supplemental benefits that were set out in sec. 6 of the memoranda nor did it have Aetna hospitalization insurance referred to in sec. 6 of the Memorandum of Agreement with the News. In addition, any of the individuals that held

In cross-examination, when asked whether during shadow negotiations after February 1988, the DNA proposed making changes in the MOA and specifically the work arrangement section, he answered that he did not recall but that it would not surprise him if it had done so and that the MOA "did come up from time to time" as it had been before February 1988. Handwritten notes of an August 4, 1988, meeting did not refresh his recollection. It was recorded therein:

M-O-A (2A)—add—(proposal from DNA) "Except those received by telephone in the classified advertising Dept. & simultaneously keyboarded into the computer system." (Maximum two-column.)

Gray testified that the Union's opposition to the JOA gave the Union bargaining leverage to obtain contractual objectives that the DNA had opposed. He testified that Local 18 demanded that the DNA adopt the MOA which had become a major issue. He testified without contradiction that in adoption agreement discussions, negotiators and representatives from both sides, including Kelleher and Jaske, frequently referred to the entire MOA by a variety of names, e.g., "guaranteed lifetime job agreement," "job guarantee agreement," interchangeably with "memoranda of agreement." Gray testified that the parties had agreed to adopt the entire MOA. He testified that he understood the agreement to have referred to the entire MOA by the phrase "job guarantees agreement," including the work arrangement provision. He testified without contradiction that no member of the management negotiating team had explicitly asserted that they had adopted only the job guarantee part of the MOA. With more certitude, and therefore credibility, Gray testified that prior to the agreement of adoption, the DNA proposed to modify the classified and display sections of the work arrangement section but no agreements were reached until sometime later. I therefore conclude that the entire MOA was referred to in the adoption agreements, inclusive of the work arrangement section, and it would have been inexplicable for the parties to have done so if they were not contemplating adoption of the entire MOAs of the News and Free Press. The full MOAs were maintained thereafter in the DNA files.

Thereafter, the parties agreed to modify the MOA work arrangement provision on May 22, 1991, by entering a written agreement to "amend the on-going Memorandum of Understanding" with respect to "the work arrangement for the impact of display and classified display advertising text on VDT terminals and other electronic devices." In return for certain paid absence concessions, the DNA obtained the following:

- a. Persons outside the bargaining unit may perform such work, which includes without restriction, the input of any display advertising text, including classified display text, to the computer through the use of electronic or video display terminals or OCRs, scanners or any other electronic means.
- b. This understanding in no way adds to or deletes from the current Collective Bargaining Agreement dated November 27, 1989, except as it specifically pertains to the input of classified and display advertising text.

There is no reference therein to the job guarantees section of the MOA.

Subsequently, the Union filed grievances alleging violations of the contact and the MOA work arrangement provision which led to arbitration hearings on November 8, 1994, and January 4, 1995. The DNA admittedly did not take a position that it had not agreed to the full MOA in those grievance and arbitration proceedings, nor that they were not in effect, as Kelleher admitted. Kelleher testified in cross-examination that he did not know and did not "care today" whether the DNA had adopted the work arrangement provision of the MOA by the February 1988 agreement. Similarly, in cross-examination, Jaske testified that he did not know "today" whether the DNA is bound by the entire MOA because, he testified, he had never been faced with the issue, and he proved to be evasive as to whether the DNA had adopted the entire MOA in 1988. He then testified that Section 2 was "all" that was adopted. But again, Jaske testified: "I've never . . . reached a conclusion and never seen any necessity to reach a conclusion as to what else was adopted."

Remarkably, he then testified:

Q. So essentially your position today is reflective of what your understanding was of that back in February of 1988.

A. Yes.

In cross-examination, Jaske conceded that in a May 11, 1995, negotiation session with Local 18, in support of a DNA position, he cited section 10(c) of the work arrangements section of the MOA. He testified that he thus was justifying a position on May 11, 1995, by citing language he now contends was not then in effect. There was no explanation offered that his citation of that section was qualified, i.e., if section 10(c) were in effect, then it would support the DNA. Rather, as the record stands, Jaske was ostensibly citing 10(c) as existing authority while now, in testimony, he contends it was not in fact extant authority. Although given his and Kelleher's equivocation on the DNA obligations under the full MOA, even that conclusion is unclear.

One of the grievances filed in early 1993 dealt with nonunit employees known as "graphic designers," a group of about eight employees who worked in the Marketing Development Department, a geographic area separate from the area in which the printers worked in the composing room, but who performed work identical to that performed by the bargaining unit employees. A second aspect of the grievance involved the input of codes and commands, traditionally the work of printers, by nonunit telemarketing employees.

The grievance involving the work of graphic designers in the Marketing Development Department and input of codes by telemarketers was filed by the Union on February 25, 1993. In the grievance and at the arbitration, the Union argued that work traditionally performed by bargaining unit employees was being performed by nonbargaining unit employees and that this was in violation of its collective-bargaining agreement and also the MOA.²³ The arbitrator agreed with the Union, concluding that the parties had negotiated specific and detailed provisions

job guarantees under the Memorandum of Agreement had died, retired or quit.

Priority surrender bonuses in sec. 7 of the memoranda had already been paid out.

²³ Two of the employees working as graphic designers were Al Davis and Larry Bouchard, who were considered nonunit employees even though they were members of Local 18. Davis and Bouchard retained certain rights because they were working as voluntary transfers out of the Local 18 bargaining unit.

in reference to the bargaining unit's work jurisdiction in the MOA. The arbitrator reasoned and concluded on page 17 of his decision:

In many situations Arbitrators are confronted with disputes relative to erosion of Bargaining Unit work in the context of impact on job security. Very often these disputes arise in the circumstances of no Contract language on removal of work from the Bargaining Unit. In the above cases Arbitrators are often willing to afford the Company a degree of flexibility to remove work from the Bargaining Unit so long as it is done in good faith—i.e., legitimate business considerations—and the Bargaining Unit is not unnecessarily adversely impacted.

The curious situation here is that the Parties have negotiated a job protection and a rather specific provision relative to Bargaining Unit work. Given that the Parties have negotiated rather specific and detailed provisions in reference to the Bargaining Unit's work jurisdiction, it is really beside the point that many of the present employees will not be adversely affected by the removal of work from their jurisdiction. The bottom line is that the Parties, even though they agreed to guaranteed job security, also negotiated rather specific provisions concerning the work which was retained by the Bargaining Unit.

He thereafter acknowledged the reasonableness of the DNA's motivation for efficient operations but observed, however, that they had agreed to "ongoing Memoranda of Understanding" as well as the "1991 Memorandum of Understanding," the latter of which he concluded

must be read narrowly to the extent that only those exceptions enumerated are the expressly agreed upon exceptions to the Bargaining Unit work of Composing Room employees.

He then concluded

the Arbitrator's authority is circumscribed by the broadly retained jurisdiction of Bargaining Unit work in the Composing Room as set forth in the Collective Bargaining Agreements before and after the 1991 Memoranda of Understanding.

Thus the arbitrator did not base his opinion solely upon an interpretation of the collective-bargaining agreement, nor solely upon the MOA as amended. Yet, the last quoted sentence did not explicitly refer to the MOA of 1974 as definitive of jurisdiction. Indeed, the Union did not base its jurisdictional claim solely upon the MOA. Its brief to the arbitrator cited the historic CBA broad jurisdiction proviso as well as section 45 of the 1992–1995 collective-bargaining agreement which defines composing room employees' computer jurisdiction as:

When a computer is performing composing room work, the jurisdiction of the Union includes the preparation of input and all handling of output, operation of the computer and all input and output devices, programming . . . and maintenance of all the foregoing equipment and devices.

The brief thereafter alludes to the MOA work arrangement section.

The DNA arbitration brief, inter alia, addressed the collective-bargaining agreement's jurisdictional section, i.e., section 6, as including "all composing room work." It ignored the MOA which was a joint exhibit and cited by the Union in oral argument. It argued that the type of ads, "spec ads," done by nonunit personnel was not covered by section 6 because of the

creative element involved. The Union argued that "spec ad" nomenclature was a fiction to disguise what in reality was clearly composing room work, creative or not. The DNA brief proffered a variety of other arguments, which are not really relevant to the issues in this case, as to why the basic collective-bargaining agreement was not violated. It did not deny the viability of the work arrangement section of the MOA.

The arbitrator's cease-and-desist order reads, inter alia:

The Employer is directed to cease and desist:

- 1. Assigning the electronic makeup and alteration of Retail and Classified Display Ads to Non-Unit graphic designers in the Marketing Department unless the Employer acknowledges that those Marketing Development employees routinely perform Composing Room work and are therefore part of the Composing Room unit;
- 2. The assignment of input of computer operation codes and commands in the production of certain weekly Retail and Classified Display Ads by non-Unit Telemarketers....

In a position statement submitted on July 28, 1995, during the investigation of these unfair labor practice charges, Respondent, in defending its actions with respect to DTU Local 18, provided a copy of the News MOA which stated on page 2 "[t]he last Collective-Bargaining Agreement [between DNA and DTU Local 18] is supplemented by a 'Memorandum Agreement.'" The position statement attached the complete agreement and stated:

That document granted protection against layoff (job guarantees) to a number of employees listed in the document, added supplemental retirement benefits and changed a number of work practices. As to work practices, they were generally described on page 5 of the document. On page 6, the classifications were changed and updated as classifications. It is specifically provided on page 6 that: "These work assignments may be increased, decreased, combined or otherwise changed to meet the needs of the office after discussion with the Union."

The argument posed therein is unconvincing because the cited language on page 6 clearly refers to work assignment for the purposes of "courtesy priority" (i.e., seniority) within section 10(c) and is not at all related to section 10(a) (work arrangements). Respondent's statement of position did not refer to the MOA as a hypothetical supplement to the contract nor did it qualify its position in this regard.

b. 1995 negotiations

Contract negotiations between the DNA and DTU Local 18 representatives were held on March 22, March 30, April 5, April 27, and May 11, 1995, the last date of which was asserted by the DNA that a deadlock had been reached on proposal 1. The Union's team consisted of its president and spokesman, Sam Attard, assisted by P. Loray, P. Coffey, Art Robbins, the union secretary and note taker, and Robert Douglas, bargaining unit member and nonexperienced negotiator. The DNA team was led by Jaske, as assisted by Kelleher, A. King, and P. Izzo. On April 27 and May 11, the International representative of the CWA (Local 18 parent Union), R. Ruth, joined the union team as chief spokesperson or at least joint chief spokesperson. J. Peralta joined the union team on April 27. On May 11, it was further augmented by T. McGrath, Derey, Romanowski, Kummer, Howe, S. Shannon, and R. Ogden.

As seen from the issues discussed above, it is highly critical as to how Jaske postulated proposal 1 and what, if anything, he said about the representation of previously unrepresented employees whom the DNA wanted to assign formerly exclusive unit work functions in what the DNA characterizes as a "shared jurisdiction proposal." Unfortunately, the parties presented a paucity of witnesses to resolve these important credibility issues of what was said by Jaske during these meetings which led up to the alleged proposal 1 impasse on May 11, 1995.

Instead of proffering the testimony of the DTU Local 18 spokespersons or, in part, even such officers as Derey and Romanowski who testified on other issues, the General Counsel and the Charging Party offered only the testimony of the inexperienced Douglas who was not only uncorroborated by other negotiators but who was also uncorroborated by the bargaining notes taken by Robbins which were not proffered into evidence. Indeed, such notes existed as Douglas was tendered them in cross-examination and was unable to find any reference therein to certain statements alleged to have been made by Jaske, including the allusion to the representation of new hires (which Jaske later denied). Indeed, in cross-examination of the April 27 meeting, he omitted a similar reference he had testified to in direct examination.

The Respondent also essentially relied upon the testimony of Jaske as to these meetings, for which it placed into evidence as corroboration the notes of Kelleher, of which the General Counsel, at least in part, conceded some accuracy in the joint bargaining issues discussed above. The General Counsel argues that Kelleher testified, only when questioned by litigator Jaske in direct examination, that he did not recall Jaske's having made those damaging references to the nonrepresentation of employees not employed in the composing room but assigned unit work outside of the room. That is true, but Kelleher was responding to the question unfortunately not categorically phrased, i.e., it was "do you recall," etc. Essentially, I disagree with the General Counsel's broad assertion in the brief that Kelleher's notes do not contradict Douglas or its witnesses as to subsequent meetings. They contradict the General Counsel witnesses as to subsequent meetings and fail to contain the representational references alluded to by Douglas, as Douglas admitted with respect to the Union's own notes.

The General Counsel argues that Douglas testified to his "best recollection" and did not waiver in cross-examination "as to those events which he recalled." Well, he did in fact waiver as to his recollection of the April 27 meeting. Although I have problems with Jaske's testimonial evasiveness and his equivocal testimony as with respect to the joint bargaining issue and with respect to the adoption of the MOAs and the Guild negotiations, infra, compared to Douglas, he was far more confident, assertive, responsive, and fluent and certain in demeanor. In testimonial substance, he was far more detailed and contextual. Kelleher's notes tracked his testimony. The General Counsel argues that Kelleher was not questioned in detail as to the negotiations. At least he was put on the stand and subjected to crossexamination. The General Counsel gave no explanation for the lack of corroboration of Douglas by either Attard or Ruth or both of them. Douglas' credibility was not only undermined by a very poor, unconvincing demeanor but ruined by the his fragmented and selective recollection. He was totally unable to recall anything else without reference to Robbins' notes. What he did recall was delivered in a choppy, uncertain, monotone voice that sounded distinctly rehearsed because of his verbatim rote-line repetition of the alleged statements regarding the impact of proposal 1 upon the unit. The General Counsel has the burden of moving forward with persuasive convincing testimony. On the issue of pre-June 1995 meetings, he has failed to do so. I must credit the testimony of Jaske wherever it conflicts or is inconsistent with Douglas.

Accordingly, I find that the March 22 through May 11 negotiations occurred as testified to by Jaske as follows:

The first meeting on March 22 began with a review of the various proposals of the DNA and the Union. With regard to proposal 1, Jaske stated that the DNA was seeking a side agreement for "shared jurisdiction." Jaske stated the DNA did not want conflicts as to whether work would be done in a particular area and used editors touching type as an example. Attard stated that proposal 1 would emasculate the contract and it would destroy the bargaining unit, that DNA would protect the job guarantees but that it wanted to operate efficiently.

Jaske told the Union that with regard to company proposal 4, the DNA wished to go from seven classifications set out in the contract to three classifications. Izzo stated that the number of classifications and the need to transfer between classifications made it cumbersome to operate the composing room. That proposal clearly had no effect and is not alleged to have any on the bargaining unit.

The meeting was a typical first meeting at which all the proposals of the DNA and the Union were reviewed. The DNA also received the Union's written response to the Company's proposals. The Union rejected all of the Company's proposals except two proposals they believed should be negotiated as part of "economics." Toward the end of the meeting, there was a brief discussion of the DNA proposal to compensate new hires, both part-time and full-time, at 50 percent of scale. Jaske modified the proposal by stating that those individuals who were MAC literate (computer capable) would get a rate of \$10 to \$12 an hour while those who were not Mac literate would get a rate of \$6 to \$8 an hour.

The second meeting took place on March 30, 1995, at the DNA offices. The parties discussed discipline and discharge issues and discussed whether the 50-percent rate for new hires would apply to both full- and part-time employees. At a point near the end of the meeting, Attard asked what the DNA's priority issues were. Jaske responded that their priority proposals were proposals 1, 3, 4, 5, 6, and 21. The meeting ended shortly thereafter.

The third meeting of the parties took place on April 5, 1995, in the labor relations conference room of the DNA at 615 West Lafayette. The same individuals were again present for both negotiating teams. The meeting dealt primarily with health insurance, alcohol and drug testing, and discharge and discipline. There was no substantive discussion of DNA's proposals 1 and 4.

The parties next met on April 27, 1995, at the DNA facility. Kelleher was absent for the DNA and the union negotiating team added Ron Ruth, an International representative for the Communication Workers of America, the parent organization of the DTU.²⁴ The meeting began by Attard stating that the Union had reviewed the DNA's priority issues and they viewed them as "permissive subjects of bargaining" and would not

²⁴ In Kelleher's absence, Jaske took handwritten notes for this meeting which, however skeletal like Kelleher's notes, do track Jaske's testimony.

negotiate over them. Jaske asked why the Union thought that the DNA's proposal 1 was a permissive subject. Ruth responded that the proposal changed the bargaining unit. Jaske responded the proposal had no relation to the bargaining unit. Ruth disagreed. Ruth repeated that the Union will never counterpropose or negotiate, not only on proposal 1 but also the other central issues contained in items 2 through 6 and 21. Jaske asserted that it appears that the negotiations were "deadlocked," The parties discussed health insurance and then caucused. After returning from the caucus, Jaske returned to a discussion of company proposal 1 and described it as an important issue for the DNA which just wanted to operate as efficiently as possibly. He stated the DNA was not looking to affect the bargaining unit nor to impact job guarantees. Jaske stated that the DNA wanted to utilize the computer technology it had so that individuals in other departments could use the computer to set type without a jurisdictional dispute. Jaske reiterated there would be plenty of work in the composing room for printers.

Attard and Ruth both restated their position that proposal 1 of the Company was a permissive subject of bargaining. Attard referred to the pending arbitration and asked to wait until the arbitration decided the matter. Jaske stated the arbitration was under the old contract but that this was a new situation that must be confronted but that Attard's position deadlocks negotiation.

The parties next met on May 11, 1995, at the DNA facility. Kelleher returned. The union negotiating team was present together with McGrath, a representative for the Teamsters; Sonny Shannon, an International representative for the GCIU, and others noted above who sat behind the union negotiating team. The meeting began by Attard handing Jaske a proposal that would have prohibited the DNA from hiring strike replacements. Attard then distributed a second document and read it verbatim. The document read as follows:

This is to notify the company that the Union's position is and will remain for the duration of negotiations that this is a "Permissive" subject of bargaining and is not negotiable as far as the union is concerned.

In 1974, the Detroit News and the Detroit Free Press signed an ongoing memorandum of agreement with DTU No. 18 regarding job guarantees and work arrangements. These job guarantee/work arrangement agreements may be amended only "by mutual consent of the parties." The union will not agree to any change to this agreement.

It is our firm position that it is WRONG for the company to insist on a side letter abrogating this agreement which is not open for negotiation.

Detroit Typographical Union No. 18 has, in the past, allowed, and DNA has utilized voluntary transfers outside the unit.

We believe the company is bargaining in bad faith by insisting on negotiating his permissive subject before it will negotiate on any other point.

The company is surface bargaining. We insist the company negotiate on all mandatory subjects in our proposal and they withdraw this regressive, unfair, unjust proposal that would negate our prior agreement.

Significantly, the letter contains no accusation of any DNA suggestion that under item 1, the Union would waive any representational claims to nonunit employees after they had been

assigned unit work. nor that the DNA had made any reference to the representational status of those employees or new hires in negotiations.

Jaske responded that the Union's position was thus the same as it had been on April 27, i.e., that DTU Local 18 will not negotiate jurisdiction as an alleged permissive subject, whereas the DNA considered it to be a mandatory subject of bargaining for operational efficiency. Attard responded that DTU Local 18 did not object to the use of an outside source contractor but that any DNA employee who performed work (presumably unit work) for the DNA, it had to be printers' work and if that required the DNA to send printers out with salespersons to visit the advertisers, so be it.

Attard then referred to the MOA and characterized proposal 1 as a violation of that agreement. Jaske asked how that was possible. Attard answered that the DNA was a successor to it. Jaske responded that proposal 1 had no relation to the MOA but rather was aimed at efficient operations with respect to salespersons using computers to perform their work.

The DNA team then caucused, drafted a written response to Attard's verbal position and presented it after the caucus. Therein, the DNA reiterated what it had stated earlier in negotiations, i.e., the intention to continue to provide unit work to all composing room employees covered by the job guarantees. It then asserted the previously discussed assertion that by its own terms, the MOA actually sanctioned its position and, further, that the Union's position, in effect demanding that all advertising material would have to be reproduced in the composing room, conflicts with paragraph 1 of the MOA which states that job guarantee and work opportunities are a quid pro quo for "the removal of past and future reproduction (reset obligations and the clearance for the publisher to enjoy the benefits in their composing room of the new technology, including but not limited to, video display terminals and scanner equipment").

The statement concluded:

Your position of today makes it apparent that these negotiations and the "discussion with the union" as required by the 1974–1977 agreement will not result in a successor collective bargaining agreement to the contract which expired May 1, 1995.

Nevertheless, we reaffirm our intention to continue to provide composing room work to all job guaranteed printers. We are available to negotiate further with you in the event your position changes and this deadlock can be broken.

According to Jaske's own testimony, there was no assertion made in response to Attard's position that the DNA was not bound by the MOA. Rather, the written DNA response cited the MOA as supportive of its position. After the DNA response presentation, the parties discussed the evolution of new computer technology and why the DNA needed proposal 1. It was explained that a salesperson can take his personal computer to visit the location of a customer or prospective customer and, as a sale tool, use the computer to compose ads on its screen for instant viewing by the customer. If approved, the salesperson can input the ad into the computer without having it redone, as required before the advent of this type of computer. Ruth's response was "well if you're going to do that, send the printers out with the ad salesperson" "that's the way that they were doing it in Dayton Ohio . . . that's the way it ought to be done down here." According to Ruth, the printer would ride in the car with the salesperson and at the point where the computer would be used to compose an ad, the printer would operate it. Jaske responded that such arrangement was nonsense because there was "plenty of work for printers to do besides ride around in a car with an advertising salesperson."

Attard responded, "Well, we're not changing our position, and our position continues to be that we're not going to talk to you on jurisdiction." The parties then reiterated their arguments as to whether proposal 1 was a permissive or mandatory bargaining subject. Jaske stated that it appeared negotiations were deadlocked and the meeting ended.

On May 22, 1995, the above discussed arbitration award issued. Jaske wrote to Attard on June 1, 1995:

I have received and reviewed the arbitration decision issued by Arbitrator Girolamo. As discussed in the negotiations, work assignments are covered by the company's proposal number one. As you know, negotiations have deadlocked over that proposal. Therefore, it does not appear necessary for any changes to be made in the current operation.

I re-emphasize what you were told at the last bargaining session. That is, nothing in our proposal changes the composing room bargaining unit. Further, nothing in our proposal impacts the continuing effectiveness of the lifetime job guarantees. I hope that we will be able to resolve this and all other issues so that composing room employees will, as soon as possible, be able to receive a pay increase.

Attard responded by letter of June 8 stating his disagreement and requesting immediate implementation of the arbitrator award. The DNA did not comply.

The parties next met in negotiations on June 15 and 22 and July 10, 1995, as described in the section of this decision relating to the joint bargaining. Now, the chief spokesperson for DTU Local 18 was Attorney McKnight. Again, we have a factual dispute as to what, if anything, Jaske stated to McKnight in those meetings regarding the representation of formerly nonunion employees who were to be assigned unit work under proposal 1. Again, the General Counsel rests upon the testimony of one witness, McKnight. Furthermore, despite the fact that Douglas testified to prior meetings and was present at these subsequent meetings, he was not called upon to corroborate McKnight's testimony. Again, negotiator team members Attard, Robbins, Loray, Coffey, Douglas, and Ruth were not called to testify in corroboration of McKnight. None of the five GCIU Local 289 representatives present at the July 10 meeting were called upon to corroborate McKnight. Robert Ogden, one of those five, did testify as to other matters as a General Counsel witness. As to the July 10 meeting, he merely testified cryptically that jurisdictional and other problems were discussed. Again, Robbins, the union note-taker, did not testify but, as noted above, his notes for the June 15 meeting were introduced into evidence only to reflect Vega's comment regarding joint bargaining and for no other purpose. McKnight's handwritten concurrent bargaining notes of June 15 were received into evidence as were his typed, more detailed recollection of that meeting dated June 18, i.e., 3 days later. McKnight testified that on the late afternoon of June 15, he dictated his "stream of consciousness" recollection of the meeting into a tape recorder, which were typed up apparently on June 18 and not read by him until a month later.

Jaske was corroborated again by Kelleher as described above. Kelleher's notes track Jaske's testimony, particular in reference to statements concerning the representational status of nonunit employees to be assigned unit work under proposal 1. Thus we have essentially a one-to-one credibility conflict between two experienced negotiator-attorney-litigators.

The General Counsel argues that probative value should be given to a lengthy memorandum dated January 8, 1995, from nonattorney, Manager Larry Ross to Taylor entitled "Extremely Confidential." ²⁵

I do not share the General Counsel's conclusion that Ross' negotiating objectives seek nonunion representation by nonunit employees assigned to composing room unit work. His language can equally be interpreted to mean that the DNA ought to be privileged to be free to assign unit work without fear of iurisdictional disputes, i.e., "it should be a management decision and of no concern to the union"; and "[t]his too should be a management decision based on good economics and productivity and not involve the bargaining units." I do not conclude that his meaning necessarily was that the assigned employees should not be represented. In any event, Jaske is an experienced labor attorney who applied his own expertise and understanding of what the law permits to bargaining objectives submitted to him by nonattorney managers. Of course, I recognize that merely being an experienced labor attorney is not a guarantee that unlawful objectives will not be pursued. But neither does it necessarily follow that they would. In any event, the Board's Antelope Valley Press decision discussed above and thereafter emphasized that it was what was stated in negotiations that is relevant and unexpressed subjective unlawful understandings of what the assignment proposal would have on the Union's right to claim representation of nonunit employees assigned the work do not satisfy the General Counsel's burden of proof.

The Union's brief writer, McKnight, stated it was too embarrassing for him to address the issue of his own credibility.²⁶

The General Counsel argues that McKnight is corroborated by his own notes. That is not quite accurate. His contemporaneous hand notes are skimpy and unclear. His subsequent reconstruction after time for thought, analysis, and perhaps wishful thinking, I find less probative. The General Counsel accuses Jaske of tending to have revisionist recollection to conform with after-the-fact legal analysis. But the temptation exists for all attorneys to look back at what was said and wish it to con-

²⁵ The document was one of many internal memoranda and analyses claimed by the Respondent to be privileged by attorney-client confidentiality from production to the General Counsel and the Union's subpoenae duces tecum. The petition to revoke was untimely filed by many weeks. For a variety of reasons set forth in the record, including but not limited to the importance of attorney-client and also bargaining strategy confidentiality and the lack of prejudice to the General Counsel and Union, I exercised what I construed was my discretion in granting the petition to revoke. See Brink's, Inc., 281 NLRB 468, 470 (1986), only one of precedents upon which I relied. The Board granted the General Counsel and Union's interim appeal and reversed my ruling and ordered production by Order dated July 5, 1996. Respondent complied and produced the documents but objected to admission on grounds of confidentiality. I ruled that in view of the Board's decision, no timely petition to revoke had been filed and thus a constructive waiver had resulted. Certain documents were admitted into evidence.

²⁶ In this regard, there is a great deal to be said for codes of ethics in some jurisdictions which preclude an attorney from litigating an issue on behalf of a client for whom he testifies as a witness in the same proceeding.

form with subsequent legal understandings so strongly that they actually convince themselves that what they wanted said was in fact said.

The General Counsel argues that Jaske was not corroborated in detail by Kelleher. I already discussed that subject. With respect to Douglas, it was a question of Respondent proving a negative, i.e., that there were no references to the representational status of proposal 1 nonunit employee assignees of unit work. Kelleher's notes had no reference in them to that subject as apparently Robbins' notes also did not. In that sense, they corroborated Jaske as did his testimonial nonrecollection. It is undisputed that McKnight, the attorney, did raise the issue. How Jaske responded is supported by Kelleher's notes which his testimony tracks. The General Counsel is not in a position to refer to Jaske's noncorroboration with detailed testimonial evidence. The General Counsel has the burden of proof but has proffered no corroboration of the negotiator-litigator-witness, McKnight, save for his own subsequently crafted memorandum.27

The General Counsel argues that McKnight's demeanor was superior. Indeed, the ebullient McKnight was the more emotive, if not theatrical, personage. Jaske's demeanor, as his courtroom presence, was stark, cold, emotionless. Jaske tended to evade and obfuscate, as noted elsewhere, with respect to the DNA joint bargaining strategy formulation as to the issue of the DNA adoption of the MOA, and regarding Guild negotiations, he resorted to gross exaggeration. Further, his tendency to make argumentative points beyond the required response in crossexamination gave the impression of calculation and not spontaneity that is usually indicative of candor.²⁸ Moreover, his examination continued over 3 days, his responsiveness diminished radically, but it was difficult to discern whether pure fatigue was more causal than lack of certainty. I did not find McKnight totally responsive either. For example, he forcefully denied that at a certain meeting, Jaske characterized proposal 1 as that of "shared jurisdiction." But he grudgingly admitted that the words did appear in his own sparse notes. Yet, he refused to attribute the phrase as a recordation of a stated DNA position despite the clear contextual inference. Furthermore, his June 15 memoranda read like a script for his testimony.

In the final analysis, basing a credibility resolution solely upon the spontaneity of an attorney-witness is extremely dissatisfying. This is so particularly with respect to trial attorneys whose courtroom experience has conditioned them to project a calculated demeanor as an advocate. Such conditioned behavior gives the attorney-witness an advantage over the nonattorney witness and even other attorney witnesses who have a less masterful or colorful courtroom presence.

Thus, although McKnight's demeanor was more impressive than Jaske's demeanor on this issue, a credibility resolution requires closer examination of the varying versions of what was said at the June and July meetings.

The June 15 meeting was the first one attended by McKnight. The testimony and notes of Kelleher are all in accord with the general flow of discussion and what was said, except for the way certain Jaske statements were phrased regarding proposal 1, and although each witness recalls state-

ments not in the other's testimony, I credit such testimony where it is not explicitly or implicitly denied or mutually exclusive

The meeting started with a review of the status of the DNA's proposed 34 demanded changes in the collectivebargaining agreement, which McKnight asked if all were still on the table. Jaske responded that yes, it was correct except for one minor issue. Jaske also pointed out some subsequent counterproposals that the DNA had made regarding health insurance. Thereupon, the parties discussed the joint bargaining issue. There was a reference to wages. Jaske stated that parties had reached impasse. McKnight asked how that was possible if they had not yet discussed the reserved economic topics. Jaske said impasse had been reached on proposal 1 which, in effect, had been implemented on May 11, the day of impasse declaration at the meeting of that date upon receipt of the Union's written statement of position. McKnight then stated that he was familiar with that letter but that DTU Local 18 was willing to negotiate proposal 1 in the DNA list of demands to the extent that it dealt with the Union's jurisdiction and it was not the Union's intention to refuse to bargain over jurisdiction despite the Union's written statement of that position. McKnight said he was concerned over the impact of proposal 1 upon the bargaining unit but he was willing to be flexible. Admittedly, Jaske stated that proposal 1 would not change the unit. I find that Jaske also said the DNA was seeking "shared jurisdiction." He is corroborated by Kelleher's notes, and he is not effectively contradicted. Admittedly, Jaske said that the DNA was seeking flexibility for efficient computer age operations, i.e., the flexibility to assign work in the pre-press making up of ads to anyone it wanted, which would include graphic designers who were then in the unit.

Admittedly, McKnight asked if DTU Local 18 would, under proposal 1, represent the employees outside of the composing room to whom customary printers' work would be assigned. The dispute is whether Jaske responded that if the work would be assigned to employees "in the bargaining unit" (Jaske) or "in the unit" (Kelleher's notes), then they could be represented by the DTU Local 18 but if not, then the Union would not represent them (Jaske); or whether he responded as McKnight testified, that it depended upon whether or not they were in the composing room, i.e., if they were not in the composing room itself, then they would not be in the unit.

Jaske asserted to McKnight that the Union need not worry because the DNA would honor the so-called lifetime job guarantees of composing room employees. Jaske testified without explicit contradiction that he told McKnight that the DNA neither wanted to increase nor to decrease the bargaining unit. Similarly, he testified that with respect to the graphic designers' performance of the makeup computer functions of printers' ads, he told McKnight that if they were in the "unit, fine," but if not, "fine." Kelleher's notes are similar but add Jaske as stating: "We have not changed the definition of the unit—if they weren't part of the unit."

Instead of proffering Robbins' official notes in corroboration of McKnight, only the sparse contemporaneous notes of McKnight were offered for the June 15 and 22 meetings. They are too cryptic to be of any real value. I also received into evidence, as noted earlier, the less probative typed memorialization of the June 15 meeting. In the typed version, Jaske prefaced his response to McKnight's representational question with the statement that he did not know, thus giving the impression

²⁷ The June 15 notes of Robbins were, upon objection, offered and received only for the part relative to Vega's participation on the joint bargaining issue.

²⁸ When cross-examined by Jaske, McKnight was not entirely free of the same conduct.

that his response was tentative and of first impression.²⁹ McKnight said that preservation of unit work was at stake and it was not good enough that certain employees had lifetime job guarantees. The parties discussed seeking the aid of Federal mediation and the Union's request for information concerning the graphic designers and caucused.

After the caucus, those two subjects were again discussed as were the DNA wage increase proposal. The arbitration award was discussed. Jaske said it was now moot and the DNA would not comply with it. Jaske reiterated the DNA's efficiency objective regarding the salesperson's ad makeup capability and that compliance with the award would be costly. McKnight responded that the arbitrator's award rejected those efficiency arguments and that it was "too late in the day" to be advocating rejected arguments (McKnight's testimony). He demanded compliance with the arbitrator's award first and promised that thereafter the Union would bargain as to jurisdictional changes. He argued that to implement the changes and then bargain about it posed a great disadvantage to the Union. They argued back and forth, but neither would change. Jaske refused to accept the cost risk of changing the operation by adopting the arbitration award, i.e., cease and desist doing what Respondent wanted to continue doing, only to undo it weeks later.

Jaske testified, correctly, that the Union made no jurisdictional proposal. He did not contradict McKnight's testimony that McKnight offered flexibility in the Union's position on jurisdiction and that he would personally intervene to explain to his client the DNA's flexibility needs as he had done in past concessionary bargaining. But it is clear neither would budge in the arbitration award compliance.

McKnight's proposition to bargain on jurisdiction conditioned upon arbitration award compliance poses an interesting conundrum. The Union's position up to this point had been that the MOA's work arrangement change was a permissive subject of bargaining upon which it would not bargain and, accordingly, the Union insisted upon arbitration award compliance upon which the basis, the Union argues, was the MOA. Was McKnight's offer to bargain on jurisdiction intended to be a waiver of that position? If so, it conflicts with the Union's theory upon which the arbitration award, post-CBA expiration, compliance obligation is based, i.e., the MOA's independent viability, apart from the contract's jurisdiction clause. If it were conceded otherwise, then the Respondent's theory is credible, i.e., that the Union's exclusive jurisdiction stems from the contract which has expired, and the MOA is mooted by the expiration thereof and the Union's refusal to bargain about it. McKnight did not explicitly state whether the Union had now waived the position advanced by Attard and Ruth. His insistence upon arbitration award compliance did nothing to clarify

It is McKnight's uncontradicted testimony that Jaske conceded that proposal 1 theoretically could allow the Respondent the authority to transfer all unit work to persons not now in the unit.³⁰ It is also undisputed that Jaske promised that the printers would lose no work and there was plenty for them to do.

There was some discussion of the two printers who had voluntarily transferred to the advertising department and who did graphic work there which became the source of the grievance, i.e., Davis and Bouchard. Jaske concededly told McKnight that if they could not bargain about jurisdiction, the DNA would return them to the composing room "to draw a line" between advertising and the composing room. Jaske testified that he told McKnight the DNA would do so to prepare for a representation case before the Board.

Kelleher's notes contain no reference to a representation proceeding, per se, but they contain the following:

McKnight: Prior to the award, the graphic designers should have been part of the unit.

Jaske: You know we are not going to put the designers into a union that they don't want to be in. You don't give up any rights—you just put it on hold.

Thereafter, the joint bargaining issue was discussed and the meeting adjourned.

The next meeting occurred on June 22. The negotiating teams were joined by Federal mediator James Stathem. McKnight continued as union spokesperson. Jaske responded to an outstanding union proposal wherein the Union had withdrawn certain demands for contract improvement, and which Jaske accepted. With respect to wage progression acceleration of a part-time employee demand, Jaske rejected its modified proposal. Jaske rejected certain union proposed modifications of certain proposed exemptions from seniority application. Jaske made the 4-percent, 3-percent, 3-percent conditionally retroactive wage proposal.

McKnight announced that he had filed an unfair labor practice charge alleging a refusal to comply with the graphic designer information request.³¹ According to McKnight, Jaske said it was pointless because the graphic designers were not in the composing room and therefore not in the unit. Jaske denied this. Davis and Bouchard had transferred voluntarily but retained their DTU Local 18 membership.³² McKnight testified that he argued that he was entitled to the information because he claimed that the "bargaining had a lot to do with graphic designers or the employees classified as such." Jaske testified that he asked as to the relevance of the information, "Are we getting into accretion issues?" He testified that McKnight merely asserted that the Union was entitled to the information. McKnight did not categorically deny the accretion issue reference

The DNA had by this meeting transferred Davis and Bouchard back to the composing room. This assignment was next discussed. According to McKnight, when he asked about it, Jaske answered that the transfer was made to moot the issue of the Union's request to honor the arbitration award by restoring the status quo and that he, Jaske, would build a wall around the composing room if he needed to. Jaske denied making that statement, but note his admission with respect to having already said that he would draw a line. Jaske admittedly again stated that the DNA did not intend to change the unit. Jaske testified that he referred to the DTU Local 18 written statement of position of May 11 as a "drop dead" letter and accused the Union of not changing its position as stated therein but that McKnight turned to the subject of the MOA, demanding to know what was left of it. McKnight did not deny it. He testified that he

²⁹ This further erodes Douglas' credibility of prior representation discussions. Robbins' notes suggest the same.

³⁰ That is, of course, possible under any lawful work assignment proposal. See *Storer Communications*, supra.

³¹ The information was subsequently supplied.

³² This is the spelling used throughout the transcript although the correct spelling is Bechard.

complained about the proposal 1 implementation and how an offer to bargain over an implemented change made genuine bargaining over jurisdiction impossible. According to McKnight, he argued that the Union requested a bargaining unit which was determined by the work it performs; and then he asked, "what is left of the MOA?" McKnight testified that he complained that proposal 1 would wipe out whole sections of the MOA, at which point Jaske guaranteed work to the printers which resembled bargaining unit work. McKnight testified that he again stated the destructive affect of proposal 1 upon "whole sections" of the MOA and that it is the nature of the printers' work that gives meaning to the bargaining unit and not the room in which they are placed. He testified that Jaske thereupon stated that in reference to the graphic designers, the DNA would only consider employees as unit members if they were working as a volunteer outside of the composing room performing nonbargaining unit work. Jaske testified merely that there was further discussion about jurisdiction, and categorically denied only that last quoted foregoing sentence. Jaske testified that they discussed the joint bargaining issue "a bit" and, after a caucus or two, reiterated their positions regarding jurisdiction and the business needs for efficiency and the practical difficulties of complying with the arbitration award.

McKnight testified further, without explicit contradiction, that he suggested in that meeting that Respondent bring technical Supervisor Larry Ross, a former Local 18 member, to the bargaining table so the parties could utilize his technical expertise "to discuss the technical and practical feasibility of having printers do the work as determined by the arbitrators," but that Jaske answered that there was "no way that the Company was going to bother doing that, that they had already implemented item 1 and they had no intention of giving effect to the arbitrator's award." At that point, according to McKnight, the parties focused on the joint bargaining issue and seniority retention rights of supervisors who were former unit members.

Thus the meeting ended without McKnight explicitly stating that the Union changed its position from that asserted on May 11 and did not waiver from McKnight's offer to discuss jurisdiction only after the Respondent complied with the arbitrator's award. However, McKnight's last suggestion regarding the use of Ross' thoughts is clearly in aid of Attard and Ruth's earlier arguments on behalf of utilizing printers when computers are used by salespersons in functions defined under the contract's exclusive jurisdiction and/or MOA as exclusive composing room printers' work but outside of the composing room.

Relevant parts of Kelleher's notes reflect only the following statements at the June 22 meeting:

[After McKnight's declaration of having filed an unfair labor practice charge]

[Jaske] Since this is apparently an accretion issue what would terms and conditions of employment of those ee [sic] have to do with anything.

[McKnight] We think it has a direct bearing on the work that we do—

[Jaske] We understand the jurisdiction issue, but whether they make \$2.00 or \$200 is not material. Your claim is based on a representation issue rather than jurisdictional.

[McKnight] I think we are entitled to it—we aren't going to decide the issue—the Board will.

They also reflect after the first caucus:

[Jaske] Our proposal is for shared or non exclusive jurisdiction—other emp need to be able to do functions that all printers can also do—we have no intention of changing the work printers

I don't get it. I don't think it plays out like that

I am not changing the [bargaining unit]—Printers will still work in the composing room & report to composing room mgt. Other people will do work that is part of their job that otherwise may have impinged on your jurisdiction

The next meeting and last prestrike meeting occurred on July 10. The same negotiators were supplemented by the GCIU Local 289 negotiating team. Jaske gave a verbal response to the previous union proposal with a counterproposal. He rejected a modified union proposal on accelerated wage progression and part-time employees. More proposals and counterproposals occurred, including the "me too" offer on wages and the joint bargaining issue.

At one point, the jurisdiction issue was raised. Jaske testified that he told McKnight that he considered his position to be "philosophical" because the DNA did not want to take away jobs from the unit. McKnight's testimony of how he responded is as follows: He stated that lifetime job guarantees were not enough and that DTU Local 18 represented not just "a list of people"; that the bargaining unit is defined by work performance; that honoring lifetime guarantees do not prevent the DNA from wiping out whole sections of the MOA by proposal 1; and that at some point, Jaske said there had been impasse since May 11. Then Jaske said he was tired of listening to philosophical "bull shit." McKnight said it was not "bull shit." but a real concern. Jaske said he had given his position. McKnight said he was not interested in Jaske's position but that that he wanted to bargain.

At this point, we have a credibility issue. According to McKnight, Jaske said that if McKnight did not "like it," that he should file an unfair labor practice charge. Jaske testified that he told McKnight that the DNA wanted shared jurisdiction for efficiency purposes and if the Union "felt that gave them the right to represent people who got the work or continued to do the work, that they had the right to go the labor board and to represent those folks." In cross-examination, McKnight categorically denied that Jaske, on July 10 or at any other meeting, stated that it was a matter for the NLRB to resolve, in a unit clarification case, the representation of nonunit employees performing unit work. He denied that Jaske told him to file a unit clarification petition and insisted that Jaske instead told him to file an unfair labor practice charge.

We have only McKnight's contemporaneous June 22 and June 15 notes proffered as corroboration and his June 18 file memorandum. Robbins' notes were not offered nor received for anything other than the June 15 statements of Vega on the joint bargaining issue. In cross-examination, McKnight also forcefully denied that at the June 22 meeting, Jaske had described proposal 1 as "simply share jurisdiction." Yet, in his handwritten notes, there appears under "Co. #1":

ees have job guarant [sic] type of work they have done . . . but need flex to [indecipherable] . . . simply shared juris—. . .

McKnight unconvincingly attempted to ascribe the use of that phrase to himself in reference to a prior shared jurisdiction with Local 289. The answer is clearly evasive given the placement of the phrase under obviously what was the stated DNA position. When pressed further, he refused to acknowledge the plain

inference of the notes. The refusal to concede this one point eroded McKnight's credibility to a significant degree in view of his initial display of sincerity and forcefulness in the initial denial

Kelleher left the July 10 negotiating session before the meeting ended. Therefore, his notes are incomplete. However, the notes of Ashley King and Keith Pierce both support Jaske's, and not McKnight's, account of what was said regarding the right of the Union to go to the NLRB and seek to represent employees to whom work may be transferred under DNA proposal 1.

Following the meeting, Jaske wrote a letter to McKnight on July 13. The purpose of the letter was twofold—to confirm that McKnight had received the information sent to him regarding the graphic designers and to reiterate the statements Jaske had made at the end of the meeting. The letter read in pertinent part:

If after reviewing the information you persist in your claim that they should be added to the bargaining unit, we believe that should be properly submitted in a unit clarification proceeding to the Labor Board.

As discussed in negotiations, nothing in our work transfer proposals to either union precludes you from claiming that these employees or any other employees should be properly considered part of either or both bargaining units.

McKnight did not respond until after a lapse of 3-1/2 weeks when, on August 3, he wrote to Jaske the following cryptic denial of Jaske's assertion regarding the July 10 discussion:

Today for the first time I actually read your letter dated July 13, 1995 regarding "ITU/Engraver Negotiations." I want you to know that I do not agree with your version of what was discussed in negotiations.

To borrow from Respondent's arguments as to the May joint bargaining agreement, McKnight's letter is significant for what it does not say. It does not categorically deny that Jaske made a reference to the Union's right to assert a claim to the Board for representation of the disputed employees. It does not assert that the DNA had insisted in negotiations that the Union waive such right. It does not reiterate that the DNA had insisted upon union representation limited to the four walls of the composing room. It does not explain how Jaske's letter is inaccurate, or as to what it is inaccurate. The letter simply asserts that in some unspecified manner and subject, McKnight disagreed with Jaske's recollection. The question is, what and how? Is it inaccurate in terminology or substance? The delay in responding and a failure to make a record of what McKnight later testified occurred is inexplicable for this experienced negotiatorlitigator-witness who, for at least the meeting of June 15, took time soon after to dictate a detailed file memoranda which he reviewed a month later and took time to add written interlineations.

In cross-examination, McKnight was asked why he did not file a unit clarification petition. He answered: "Because I didn't want to. I didn't think it was legally necessary or appropriate. I thought you'd bargained in bad faith."

I have some doubts that the General Counsel sustained his burden of proof by submitting solely the uncorroborated testimony of a negotiator-witness-litigator. But if constrained to make a credibility recollection between two negotiator-witnesslitigators, both of whom are not wholly convincing witnesses, I must find that the testimony of McKnight is not sufficiently reliable and accurate to support the burden of proof and on this issue. I credit Jaske.

First, the testimony of Jaske has been credited as to the negotiations up to and including May 11. I note that Douglas' credibility is further eroded by Jaske's tentative response to McKnight's representational question on June 15, according to McKnight's notes which indicate that it was not raised previously. Jaske, in other respects, has displayed a tendency to evasion and obfuscation. However, I find it improbable that he made such a direct blunder by clearly committing the DNA to a position so inapposite to that of clear outstanding Board precedent to an experienced attorney-labor negotiator. Further, I found McKnight least persuasive as to whether Jaske told him to file a representation petition if he so desired. I find McKnight's testimony and his testimonial demeanor unconvincing on that issue. The General Counsel derides Jaske's July 13 letter as "legal posturing." Well, the same can be characterized of McKnight's file memorandum dictated, he says, on the late afternoon of June 15 into a tape recorder in a "stream of consciousness" narration. The same "legal posturing" can be attributed to his inconclusive and inexplicable response to Jaske's July 13 letter, which was composed and drafted in less than 3 days after the event and is at least corroborated by some concurrent bargaining notes, unlike the uncorroborated McKnight. Even if Jaske did not make that commitment, as claimed in the letter, the letter itself is more than posturing because it clearly withdraws any previous suggestion that the Respondent expected the Union to waive any representational rights, and moved Respondent within the purview of the Antelope rationale. After that letter, the Union did not respond with any counteroffer on the assignment of unit work. The letter is therefore substantively significant. However, I find that if Jaske, an attorney-negotiator as experienced and well versed in Board law, had not made references to the Union's lack of a right to assert a jurisdictional claim, McKnight would not only have pinioned Jaske with a detailed contradiction, but would have more likely have sent his own confirming letter of what was said well before that; or have dictated another stream of consciousness file memorandum; or at the very least have highlighted it in contemporaneous bargaining notes. If such existed, they were not proffered into evidence, although McKnight claimed that he customarily took such contemporaneous notes.

Having concluded that Jaske is more creditable with respect to his references to the Union's right to assert representational rights before the Board, not only on July 10 but at earlier meetings, I find it improbable that he would have phrased his responses to McKnight's inquiries on the representation of nonunit employees assigned unit work in such a manner as to support an inference that the DNA was insisting upon a representational waiver by proposal 1. I must conclude that Jaske's testimony and his limited corroboration by Kelleher and Kelleher's notes are ultimately more convincing and probable than McKnight's testimony which, for no explained reason, was uncorroborated either in whole or in part by witnesses who testified on other matters or who were shown to have been unavailable to testify.³³

I therefore find Jaske did not, in negotiations either before or after May 11, 1995, make any clear or reasonable construable

³³ Respondent claims in the brief that Attard was present in the hearing room as an observer.

representation to the union negotiators that DTU Local 18 would, by virtue of proposal 1, waive its right to recourse to seek representation of the nonunit employees assigned to work thereunder by means of a Board representation petition, an unfair labor practice proceeding or some other legal process.

3. Analysis

a. Alleged scope of unit bargaining

I conclude that Respondent, by virtue of insisting to impasse bargaining on proposal 1, sought to achieve for purposes of business efficiency through advanced computer technology, the sharing of work defined by the collective-bargaining agreement and allegedly the MOA, as amended, as work performed exclusively as unit work. I find that the General Counsel has failed to sustain the burden of proving that the DNA negotiator "ever insisted or communicated in negotiations that the proposal 1 language" meant that employees to whom unit work might be assigned pursuant to the proposal would never be considered members of the unit. Antelope Valley Press, supra, 311 NLRB at 462 fn. 10. The DNA did not, as was done by the employer in Bremerton, supra, 311 NLRB at 471, insist to impasse on a change in the unit description. The DNA, as it stated many times in negotiations, simply sought to assign unit work to persons not in the composing room. Further, it is not relevant that that right theoretically gave the DNA the power to reduce the size of the unit or even alter its membership, as would any transfer of unit work. Batavia Newspapers Corp., 311 NLRB 477, 480 (1993). I conclude that Respondent, as in Batavia, was not seeking to alter "who the Union represented but rather what work the employees performed [and] [t]he Respondent wanted more flexibility over the operation of its composing room and sought the sole discretion to assign composing room work as needed . . . [and] did not seek to move job classifications or employees, and the Union would continue to represent the same group of employees," as was described and found lawful in Batavia Newspapers Corp., id. In this case, the DNA went further and gave assurances of the nondiminution of work performed by the composing room unit members.

Furthermore, even if McKnight were credited as to Jaske's descriptions of the union representational status, I conclude such were arguably tentative statements of position with respect to potential representation claims. The proposal 1, like the zipper clause in *Chicago Tribune Co.*, supra, 318 NLRB at 925, "does not include a clear waiver by the Union of its right to contend that any individuals performing reassigned unit work should be included in the unit." I read nowhere in the Board's decisions that the Respondent must gag itself as to a statement of position with respect to such representational claims. Clearly, it can oppose them. The vitiating element is whether the Union was led to believe by clear negotiation statements that it waived the right to make such claim. Even under McKnight's testimony, I find insufficient evidence to conclude such occurred here.

b. Bargaining to impasse over the MOA

I conclude that the above factual findings establish that the DNA, by its conduct and by its statements in its dealings with the Union in and out negotiations and grievance proceedings, revealed that it considered itself to have adopted the MOAs as amended. However, do these documents which have no terminal date unlike the CBA exclusive jurisdiction clause, bind the DNA onto perpetuity unless the Union agrees to modification?

Clearly, the collective-bargaining agreement exclusive jurisdiction clause is a mandatory subject of bargaining insofar as it defines work tasks as exclusively bargaining unit tasks. As found above, the Respondent DNA may lawfully insist upon bargaining about work assignments. If the Union gained for perpetuity the permissiveness of such subject by side agreement what it did not possess by contract right, then it would indeed have gained an astounding feat, one that I am not sure is at all compatible with the public interest or labor peace. Such agreement perpetually handcuffs industrial progress through technological evolution and forces the parties perpetually to situations made intolerable by technology, unless one of the parties agrees to the modification. As noted earlier, the General Counsel and the Union cite to support their theory that the MOA was a permissive bargaining subject, only cases involving side agreements of a fixed term.

Administrative Law Judge Joel Harmatz explicated a theory, closely approximating the General Counsel's rationale, in *Chesapeake Plywood, Inc.*, 294 NLRB 201, 212 (1987). Judge Harmatz dealt with a Court approved Equal Employment Opportunity (EEO), Title VII, discrimination lawsuit settlement agreement jointly executed with the Union. He found that once executed, it became bound to the strictures of Section 8(d) of the Act and "absent mutual consent," could not be modified during the collective-bargaining renewal negotiations which preceded the settlement agreement's own term, i.e., the agreement continued viable after the contract expired and became a permissive bargaining subject. The Board was careful to note that it was permissive only in the sense that the employer could not lawfully insist upon modification during its *term*.

All the General Counsel's supporting cases deal with side agreements that not only are of a fixed term, but are unambiguous. The MOA here is claimed to give DTU Local 18 exclusive jurisdiction over certain defined work tasks customarily performed in the composing room. Respondent argues that it defines work to be performed as it states "within the jurisdiction of the Union," which is determined as to exclusivity by the collective-bargaining agreement. Therefore, it argues, since the contract expired, jurisdictional exclusivity becomes a mandatory subject of bargaining and the defined work tasks in the MOA are "within the jurisdiction of the Union" as negotiated. It argues that the MOAs, which are part of the collectivebargaining agreement and are subject to the collectivebargaining agreement's jurisdiction clause, do not confer exclusivity of themselves. It may well be argued that Respondent has acted upon an equally feasible interpretation of the Memoranda of Agreement and the Board ought not act as an arbitration interpreter as to the propriety of its interpretation. Compare NCR Corp., 271 NLRB 1212, 1213 (1984); Conoco, 318 NLRB 60, 62-63 (1995).

However, I conclude that the proposal 1, as found above, was a mandatory subject of bargaining under Board precedent. Further, under Board precedent, the MOA does not convert to a permissive bargaining subject because the MOA does not fall within the definition of a fixed term agreement under Section 8(d) of the Act. If the MOA imposes obligations upon the DNA, the breach of that agreement, I find, is not an unfair labor practice. Redress must be sought in some other forum.

c. The impasse

The Union argues that Respondent had violated the Act by "insisting to impasse" upon modification of the MOA and the

scope of the unit. The General Counsel argues that the implementation of proposal 1 was unlawful because no valid impasse was reached because of the permissive nature of the bargaining subject. Neither party alleges or argues that even had the subject been mandatory, there was no impasse, i.e., deadlock in negotiations. The complaint does not clearly allege that as an alternative theory of violation. In any event, I agree with the Respondent that as of May 11, 1995, a valid impasse was reached upon a mandatory subject of bargaining.

The Respondent correctly sets forth the appropriate precedent as follows:

The duty to bargain "is limited to those subjects" commonly referred to as mandatory subjects of bargaining. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

It is settled law that the duty to bargain does not require:

a party to engage in fruitless marathon discussions at the expense of a frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of the collective bargaining agreements.

National Labor Relations Board v. American National Insurance Co., 343 U.S. 395, 404 (1952). Parties are free to take positions which serve their best interests and, so long as they bargain in good faith, steadfastly maintain those positions to a point of impasse. Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enforced sub nom. American Federation of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

"Whether a bargaining impasse exists is a matter of judgment." *Taft Broadcasting*, supra. In *Taft Broadcasting*, the Board set forth a number of factors to be taken into consideration in determining if there was an impasse:

The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Furthermore, there must be the realistic possibility that further discussion might be fruitful. *Television Artists AFTRA v. NLRB*, supra.

From the factual findings above, it is clear that the parties bargained to impasse on the basic issue of proposal 1. The Union's position was stated in unalterable terms which, up to that time, was unwavering. It refused to bargain on a mandatory subject. I find that as of May 11, no reasonable possibility existed that future discussion would be fruitful. As of May 11, the DNA had not engaged in any unfair labor practices or other bad-faith conduct on the DTU Local 18 negotiation. I find that as of that date, a bona fide impasse was reached upon the fundamental issue enclosed in proposal 1.

Neither the General Counsel nor the Union addresses the issue of whether the impasse was dissolved by McKnight's subsequent offer to negotiate jurisdiction on June 15. A subsequent change of position or even a modification of position that creates a possibility of fruitful discussion can dissolve an impasse. Webb Furniture, 152 NLRB 1526 (1965); Hi-Way Billboards,

206 NLRB 22 (1973); Charles D. Bonnano Linen Service v. NLRB, 454 U.S. 404, 412 (1982); Circuit-Wise, Inc., 309 NLRB 905, 919–921 (1992); Air Flow Research & Mfg. Corp., 320 NLRB 861 (1996).

I conclude that McKnight's offer to negotiate jurisdiction did not create an opening for subsequent fruitful discussion because he offered no counterproposals, did not clearly waive the Union's position that bargaining on exclusive jurisdiction was a permissive subject and that it would never agree to shared jurisdiction. The only suggestions offered by McKnight were that ways can be devised to utilize composing room employees to complement the work of nonunit employees. There was no clear offer to negotiate shared jurisdiction as a mandatory subject. I do not conclude that his statements dissolved the impasse. There is no evidence that Respondent refused to discuss any counteroffer.

I conclude that on May 11, 1995, a valid impasse existed in negotiations on the core issue of shared jurisdiction, i.e., work assignment, when Respondent implemented proposal 1 which, in effect, constituted a refusal to cease and desist from the assignment of composing room unit work to nonunit marketing and sales personnel. Accordingly, I find the complaint allegation to be without merit.

E. Case 7–CA–37417—The Detroit News/Guild Negotiations— Merit Pay, Overtime Exemptions, Television Appearances (Complaint Par. 24–36)

1. The issue

Paragraphs 24 through 30 of the complaint allege that: "on or about July 6, 1995, Respondent News, unilaterally and without agreement with Newspaper Guild, Local 22, implemented a merit pay plan bargaining proposal including the amounts and criteria of merit pay raises to be granted to bargaining unit employees represented by that labor organization," and "a bargaining proposal concerning the right to assign employees represented by that labor organization to make television appearances without additional compensation," both of which are alleged to be mandatory bargaining subjects upon which no valid bargaining impasse had been reached. It is further alleged that the television appearance proposal was implemented "at a time when an earlier implementation of that proposal was at issue and pending before an administrative law judge in Case 7-CA-36657," "and prior to having remedied the unfair labor practice of its earlier implementation of that proposal in Case 7-CA-36657."

The complaint paragraphs 31 through 36 allege that the News had refused to comply with the Guild's request during negotiations for necessary information relevant to the News' bargaining proposals, described as follows:

- 31. On or about April 25, 1995, and July 10, 1995, Newspaper Guild Local 22 orally requested that Respondent News furnish it with certain information regarding the formula, amounts and criteria of its merit pay plan bargaining proposal.
- 34. On about July 10, 1995, Newspaper Guild Local 22 orally, and on July 11, 1995 and August 4, 1995, in writing, requested that Respondent News furnish it information regarding the details of its bargaining proposal concerning the payment of salary in lieu of overtime.

The issues are clear-cut. Respondent admits the implementations but argues that valid impasse had been reached on July 5 when it implemented its last offer. With respect to the merit pay information request, it argues that it had complied with the request to the extent that there was no information requested that it was obligated to furnish and that it failed to furnish regarding an employer discretionary merit pay plan that had no fixed formula or objective criteria to disclose.

The General Counsel and Guild argue that assuming that a valid impasse had existed, Respondent's implementation of such a broadly discretionary merit pay plan proposal was unlawful, citing *McClatchy Newspapers, Inc. (McClatchy II)*, 321 NLRB 1386 (1996), on remand of *McClatchy I*, 964 F.2d 1153 (D.C. Cir. 1992). Respondent argues that the facts herein are distinguishable but, in any event, argues that *McClatchy I* and *II* were wrongly decided as was its supporting precedent, *Colorado Ute Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 112 S.Ct 2300 (1992).³⁴

With respect to the overtime issue information request, the Respondent argues that it was asked for information that it did not possess but, to the extent any information was available, it was furnished.

The admitted implementation of the television appearance proposal occurred during the pendency of an administrative law judge's decision. That decision, adverse to the News, issued on July 14, 1995. On October 12, the Board affirmed that decision but modified the recommended Order to include a status quo remedial Order. *Detroit News, Inc.*, 319 NLRB 262 (1995). Respondent argues that it was not obligated to restore the status quo ante because it had bargained in good faith to impasse on merit pay and overtime exemption subsequent to the original unlawful implementation. It cites, inter alia, *NLRB v. Cauthorne*, 691 F.2d 1023, 1025–1026 (D.C. Cir. 1982); and *Storer Communications, Inc.*, 297 NLRB 296 (1989). The General Counsel argues, inter alia, that no valid impasse had been reached and that the above precedent involved certain preconditions of employer behavior which were not met by the News.

2. Facts

a. Background

Since 1974, the Guild has represented the News' editorial staff, including such classifications as reporters, columnists, editorial assistants, photographers, copy editors, cataloguers, secretaries, stenographers, and messengers. At all material times, the Guild's bargaining unit at the News has consisted of about 200 employees

Traditionally, the Guild and News negotiated wage minimums which varied by job classification and experience level. The Guild's traditional bargaining objective was to achieve increased across-the-board minimums. In their 1992–1995 labor agreement, the Guild and News agreed upon a variation, i.e., across-the-board bonuses in each contract year. In all the parties' contracts since 1975, the Guild "expressly recognized" the "right of any employee to bargain individually with The Detroit News for wages or conditions better than the minimum standards set forth" in the agreement. Increases which individual unit members obtained under the section 9 contractual waiver provision cited above were normally referred to as merit

raises. Thus, during a contract's term, a unit employee might achieve an increase in wages in three ways: first, through whatever across-the-board increment the Guild obtained in bargaining; second, by the employee's moving to the next rung in the experience ladder; and third, by receiving a personal merit raise

Robert Giles started his association with the News in 1986. At all material times, he has been the News' editor and publisher. Giles had developed an employee performance appraisal system at another newspaper for which he worked and introduced it at the News in 1987 or early 1988. The Guild did not participate in its development and was concerned about the subjectivity which it perceived to be inherent in the program.

The parties' 1989-1992 and 1992-1995 contracts did not refer to any particular evaluation program. Rather, they provided that the News would conduct annual unspecified "[p]erformance reviews." Each contract further acknowledged that "[o]ne use of the performance review is to aid in the determination of whether a merit increase should be granted." Under the 1989-1992 agreement, there was a grievance-andarbitration procedure for performance reviews and merit increases. Under the procedure, the Guild did not have the right to arbitrate the amount of the increase. There have been arbitrations regarding the performance appraisal system. A set of evaluation guidelines was also developed. Increases were determined based on recommendations from the evaluating editor and department head to editor and publisher Robert Giles who reviewed the recommendations, and they then made a decision on the amount of merit pay to be given to an individual. There was no formula used for determining the monetary amount of the merit raise.

The merit increases referred to in the contractual language were the results of the direct dealing between individual employees and management pursuant to the Guild's contractual waiver in section 9. Giles conceded at trial that the News made such merit increase decisions wholly without the Guild's involvement and that the Guild was not privy to whatever factors the News applied to those decisions.

In the negotiations leading to the parties' 1992–1995 contract, the News urged the Guild to accept a more comprehensive merit pay system which Giles testified was similar to the 1995 merit pay proposal at issue herein, which he described as a "significant departure" from the way that merit increases had been handled under the section 9 waiver contained in past contracts. The Guild resisted, and the News' merit pay proposal was one of the last issues to be resolved during 1992 bargaining.

During the ensuing contract term of 1992–95, the News, pursuant to the section 9 contractual waiver, granted merit increases to roughly 55–60 percent of the editorial staff, which was less than in preceding years. Giles testified, "We indicated to the staff and to the Guild that their lack of interest in the merit pay proposal that we made [in 1992] was going to be reflected in fewer merit increases during the period of the contract."

By side agreement, a four-person committee—two representatives from the Guild and two from management—was appointed to review objections to the performance appraisals. Giles testified that merit increases were given if an employee received a major change of assignment, assumed more responsibility, was significantly underpaid for that employee's per-

³⁴ See *McClatchy Newspapers, Inc. (McClatchy III)*, 322 NLRB 812 (1996), in accord with *McClatchy II*.

formance level or where an employee was being recruited by other news organizations and the News wanted to retain them.

In preparing for negotiations in 1995, Giles and John Jaske (Gannett's vice president) agreed that a comprehensive merit pay program was a central issue which they would "stick to," i.e., "If we couldn't get an agreement, potentially we might go to impasse" (Jaske).

b. 1995 negotiations—preimplementation

By letter dated February 20, Giles forwarded to Donald Kummer (the Guild's chief administrative local officer) a 14-point proposal. Paragraph 7 sought new language to the effect, inter alia, that "News Department employees who qualify as professionals within the meaning of Federal wage and hour laws may, at their option, apply annually to be salaried and exempt from overtime. Any employee so applying may be offered a salary." Employees would be free to accept or reject becoming exempt. However, if they accepted, they would retain that status for a calendar year, after which they could "opt out" if they wanted and "go back to non-exempt status with an appropriate adjustment in salary." The salary would "take into consideration" past and anticipated future overtime.

Proposal 6 provided that employees could at their option, accumulate any hours worked between 37-1/2 and 40 hours in any week and take them as paid leave at a time mutually agreed upon with the employer. Proposal 8 stated:

Add to Article XIII the following: "This includes but is not limited to assigning employees on a non-exclusive basis to news and information projects of any type or nature including but not limited to those involving television, radio, CD-Romm, interactive media, research services, etc." (By making this proposal the Company does not concede that any prior work assignment to employees has violated the contract.)

Proposal 11 stated:

In Article XIX add the following: "All future pay increases to bargaining unit employees will be on the basis of merit utilizing the Company's performance appraisal system."

With respect to pay increases, the Guild was seeking flat across-the-board increases.

The Guild and the News held their first bargaining session on March 22. The News' negotiating committee consisted of Jaske who was the chief spokesperson, Jim Gatti, managing editor for the News, and Joyce Smith, a paralegal who attended to take notes. The Guild committee consisted of Donald Kummer who was the chief spokesperson at most of the meetings, Luther Jackson who was then assistant administrative officer, Lou Mleczko, president of Guild Local 22, and Guild members Claudia Pearce, Alan Lengel and Robert Ourlian. At this meeting, the parties exchanged and very briefly reviewed their bargaining proposals. Jaske reviewed the News' merit pay plan. He also reviewed the News' overtime proposal and discussed a related adjudication involving the Washington Post and the issue of a reporter's professional status exemption eligibility.³⁵ He explained that those who wished to be classified as professionals could apply to be considered and if appropriate, the News would determine a salary for them. The Guild indicated that they wanted to get rid of performance appraisals which they viewed as a "waste of time." The meeting lasted not more than an hour and, as Jaske testified, the meeting was simply a "run through," at which "there wasn't any substantive negotiations" 36

The next meeting was held on March 31 with the same parties in attendance. It lasted for about 3 hours inclusive of a caucus and lunchbreak.

After some brief discussion of other issues, including health insurance, Jaske raised the subject of merit pay. Jaske stated that the News was extremely interested in it and viewed it as a central issue. A discussion of unspecified detail ensued. However, it is uncontradicted that Kummer responded that the Guild had "a different point of view" on merit pay and that he raised a concern about the Guild's perception of a disparity of application of the current system merit pay with respect to sex and other minority status. That expressed concern gave rise to a substantial discussion. Mleczko testified that there was no further elucidation of the merit pay proposal, but neither his testimony, Jaske's testimony nor Smith's notes reflect that Kummer asked for elucidation.

The discussion then turned to proposals 6 and 7 which Jaske explained and which Kummer admittedly characterized as a subject upon which it was illegal to bargain and illegal to agree upon according to the Guild's legal advice. Mleczko admitted that from March 31 to the July 5 implementation, the Guild made no written or verbal counterproposal to proposal 7.

After the meeting, and on March 31, Giles issued one of a series of his memorandum bargaining status reports directly to the editorial staff unit employees. The General Counsel points out the reference therein to Giles' statement that the existent performance appraisals program will be the "primary basis upon which merit pay recommendations are made." The General Counsel correctly notes that the record fails to show any such disclosure to the Guild up to that point. In any event, the News was inclined to volunteer information about its proposals directly to unit employees rather than to their representative at the table.

The parties' negotiating teams met again on April 6 and discussed the health insurance issue. On April 10, the News filed an unfair labor practice charge which alleged that the Guild refused to bargain about the overtime exemption proposal.

The fourth bargaining meeting on April 25 commenced with a continuation of the health insurance discussion and divergent costs of the Blue Cross and HMO plans. Thereafter ensued the first substantive discussion on the merit pay proposal. The News modified the proposal. Instead of pay being based purely on merit, under the revised proposal, employees would receive a 1-percent across-the-board increase in each year of the agreement. In addition, there would be "what amounted to a

³⁵ Sherwood v. Washington Post, 677 F.Supp. 9 (D.D.C. 1988), reversed and remanded 871 F.2d 1144 (D.C. Cir. 1989), on remand 871 F.Supp. 1471 (D.D.C. 1994).

³⁶ There is very little in the testimony of General Counsel's witness Mleczko (and Attorney Duane Ice regarding July meetings) which is contradicted by Respondent's witness Jaske. Some apparent contradictions in Jaske's direct testimony were resolved in cross-examination where it became apparent that he had exaggerated and somewhat slanted his direct examination. The recitation of facts is based on testimony that is either not contradicted explicitly or implicitly, or is not mutually inconsistent except where specifically noted herein.

I note also that Mleczko was not free from the same tendency to shade and slant his testimony. The Guild's chief negotiator, Kummer, did not testify. Smith was the notetaker for the News. Her notes of the meetings were received as General Counsel exhibits. Jaske was not corroborated with testimony as the other News negotiators did not testify

merit pool based on the minimum salaries in the contract" of 3-percent in the first year, 2-percent in the second year and 2-percent in the third year. Anyone over the contract minimum would have their pay determined purely on merit.

Mleczko testified that Kummer asked several questions regarding the timing of the distribution of the merit raises, how much money was involved in the distribution and what "vehicle or formula" was to be used in determining this amount of money." He testified that Jaske responded, with respect to the timing of distribution that he was not sure but would get back to Kummer on that and that Jaske said he could not provide any specific amounts. Jaske testified that he told Kummer that the amount remained to be calculated. Mleczko testified that other than Jaske's saying the merit raises would somehow be tied to annual performance reviews, "we could not ascertain [sic] any specific formula or calculation that was used on how much each person would receive."

In cross-examination, Mleczko added that Jaske also explained in response to Kummer's questioning that the base 1 percent would be retroactive to ratification and that the range of merit raises would be from 2-percent to 6-percent, with an average of 4-percent in the first year of the base rate or top minimum paid each employed in each classification, data of which, he claimed, the Union routinely and periodically received from the News. Jaske admitted that Kummer did not merely ask him broadly about the formula but that Kummer asked a number of questions including how the pool would work (stating that how the money was distributed was critical) and asked how the money would go in and come out.³⁷

Kummer complained that the proposal effectively eliminated union involvement from the merit pay program. Jaske responded that the Union could pursue a nonarbitrable grievance. Jaske testified that Kummer said that the Union was generally opposed to merit pay and did not like it, to which he, Jaske, responded that the News was "wedded to it, very interested in it." When Kummer asked if there was something in writing, Jaske said that the News could provide something if the Guild "were interested in moving ahead." Kummer stated that he had a meeting coming up with the membership and would like to be able to explain the News' position and wanted something in writing. Jaske agreed to provide something.

The General Counsel argues that:

The dialogue on April 25 failed to clarify such points

the dollar amount that the News proposed to dedicate to the merit pool in each contract year;

whether the recipients of the described "merit pool" money would be only those employees paid at scale, or also those paid in excess of the minima;

whether the guaranteed 1% would be allotted to all unit employees or only those paid at scale; and

whether the contract minima would be increased independent of the merit system.

However, there is no evidence that all of these specific questions were asked. The General Counsel argues:

The formula to be used to determine the percentages referred to in Jaske's calculus was similarly cloudy. Jaske stated, in response to Kummer's question concerning the formula, "We would use 4% of the minimum in each category." This did not explain how many "minimum" wages would be added before the News multiplied by a factor of .04. Moreover, each job category set forth in the contract had multiple minima corresponding to different experience levels. Jaske's response failed to clarify whether the percentage would be based upon the highest step of the scale, the lowest, or perhaps some average.

Again, there is no evidence that these precise questions had been asked by Kummer. However, it is clear that Kummer's questions indicated that he was seeking from the News as much explanatory information about the proposal and how it would function as the News was capable of giving. All that Kummer possessed to present to the membership was a skeletal outline with promises of further explanation.

Later that day, according to Jaske's testimony, he and Giles discussed the News' merit pay proposal and whether they should make any further modification in view of an upcoming union meeting, and they also decided that rather than tie merit strictly to minimums, it would be simpler to apply merit to all salaries. The change is significant because the vast preponderance of unit employees was receiving more than the basic contract minimums for their classification. Giles and Jaske agreed to propose a 1-percent across-the-board increase with all increases averaging 4-percent the first year, 3-percent the second, and 3-percent the third. They then drafted a proposal which the News alleges reflects these changes.

On April 27, Jaske sent a copy of the News' revised proposal to the Guild's office by facsimile. He then called the Guild's office and spoke to Kummer's assistant, Luther Jackson, and made sure the proposal had been received. Jaske left word that he would be available if Kummer needed to meet briefly to discuss the proposal. Jackson replied that Kummer received the proposal, understood it and that a meeting would not be necessary. The document encompassing the proposal does not explicitly define what the percentage base is, i.e., actual salary rather than contractual minimum. The proposal did state that the performance evaluations, which had been arbitrable in the past, would now be grievable but not arbitrable. This is a significant retreat in union merit pay involvement from the prior contract.

At the fifth negotiation meeting on May 3, Kummer reported the membership's reaction to the merit pay proposal. I find Kummer more credible than Jaske as to what was said at this meeting because Jaske's exaggerations were exposed in cross-examination and revealed the inaccuracy of his recollection which was not even supported by Smith's notes. For example, in his direct examination, Kummer supposedly reported that the membership is not "in any way interested in merit pay." In cross-examination when confronted with Smith's unsupport-

³⁷ Smith's notes reflect that Kummer pointed out to Jaske that some employees would be reviewed for performance in January and others later in the year and that the date of their merit pay distribution would affect the amount of raise received because of the change, the amount of money in the pool at that time, to which Jaske agreed but noted that further discussion was necessary.

³⁸ Giles testified that the News' initial merit pay proposal contemplated using the highest rung of the scale ladder as the basis of the percentage computation. No witness, including Jaske, corroborated Giles' assertion. When asked where that concept was written, Giles could not answer nor could he remember actually discussing the maximum scale idea with Jaske.

ing notes, he testified that it was the broad thrust of what he understood Kummer to have said. Accordingly, I find the following was said by Kummer.

Kummer reported that although he had explained the merit pay proposal to the unit members as best he could, i.e., with the limited information he possessed about it, the members were not interested in it. Jaske responded that the News would insist upon it and that without agreement upon it, there was little optimism of reaching agreement on anything else. Jaske then reviewed the Guild's 56-page proposal and rejected it point by point except for a minor area. Included in the rejections was the Guild's proposal for a 15-percent across-the-board flat pay raise. I find, however, there was no explicit reference to "deadlock" by either party. The parties went on to discuss medical insurance without any resolution. The Guild persisted in characterizing proposal 7 as illegal.

Giles issued a May 3 editorial staff employee memorandum wherein he stated that in negotiations, the Guild "flatly rejects the merit pay proposal." In a May 10 memorandum, he accused the Guild of refusing to bargain over its merit pay proposal. These are palpable exaggerations, if not outright misrepresentations.

On May 24, Jaske wrote to Kummer, inaccurately stating:

During the last meeting on May 3, you told me that the union had firmly rejected the company's merit pay plan. It appears that the negotiations are deadlocked. If you have any further proposals, please make them as soon as possible. I am available for a meeting on Wednesday or Thursday of next week.

Mleczko testified that as of May 24, the Guild negotiators were still trying to "get a handle" on the merit pay proposal. According to Mleczko, as far as the April 27 proposal, it was not perceived by the union negotiators to constitute a change in the basis of percentage calculation and they were confused as to what the 4-percent average meant and did not know that it referred to actual salaries received. If confusion existed, no questions were asked at the May 3 meeting, however, to try to resolve that confusion. However, it is unreasonable that the union negotiators should have suspected that the percentage base had changed.

Kummer wrote to Jaske on June 2, claiming the parties not to be at deadlock. He suggested another meeting. Jaske replied by letter dated June 7. He agreed to meet the following week and added that Kummer "should already know" that the "News, like the DNA, ha[d] established a firm deadline of June 30 for completion of all negotiations."

On June 6, Mleczko telephoned Jaske to schedule another bargaining meeting. Jaske asked whether the Guild was ready to make some counterproposals on merit pay and overtime. Mleczko responded that the Guild would "be prepared to respond to all the issues on the table." The parties agreed to meet again on June 14.

The sixth bargaining meeting opened with Jaske giving an ambiguous response to Kummer's question as to the meaning of the June 30 deadline. There was some discussion about the possibility of joint bargaining with the Council and DNA which the News dismissed. With respect to proposal 7 (overtime exemption), the Guild negotiators initially insisted it was illegal and that Jaske then claimed deadlock because the Guild could not bargain over it but later in the meeting, Kummer asked a series of questions concerning the proposal, i.e., how the inlieu-of-overtime salary would be determined, the duration of an

exemption commitment, how could professional status of a unit employee be determined, how managerial abuse might be contained and how the application policy would operate. Jaske responded that management could make all determinations; past overtime would be a factor and management would estimate, by extrapolation, probable future overtime. Management would review the voluntary application of the employee and evaluate his job functions and rely upon professional status criteria utilized in an exemption determination under the Fair Labor Standards Act in litigation involving a reporter referred to as the Washington Post *Sherwood* case. Probabilities would restrain abuse.

Kummer requested a list of unit employees the News considered to be eligible for professional status. Jaske refused, saving that the News had no such list, had made no such determination and intended to make no such determination prior to actual employee application because, he claimed, each application determination had to be very fact specific, applying the Sherwood case criteria.³⁹ Kummer also protested that with respect to the application process, management must not bargain individually with the employer. Jaske responded that the proposal gives the employee the option to have a union representative present at the evaluation. Thus, union involvement depended upon the individual employees' willingness to make such request of management. Kummer suggested that the Guild and News jointly seek advisory opinions from the U.S. Department of Labor as to each applicant employee's professional status exemption qualifications under the FLSA. Jaske angrily rejected that proposal as merely retaliatory in nature.

With respect to the merit pay discussion, the substance of it occurred between the Guild's characterization of proposal 7 as illegal and the postcaucus opening of that very topic by Kummer's questions. It opened, as did the proposal 7 reference, by Jaske's declaration of impasse, to which Kummer gave no immediate response. When Jaske said that there was no progress on core issues, Kummer responded, "We're trying to improve our lot, not [the] company's." Yet, admittedly with respect to both topics, Kummer said that the Guild was there to meet to be able to make proposals. Kummer proceeded to ask questions about the merit pay proposal. Mleczko testified that going into the meeting, the negotiators were premising the percentages as based on contract minimums and not actual salaries. This is reasonable since they were never told otherwise up to this point. Jaske admitted that in the course of the questioning, Kummer revealed that he had not previously understood what Jaske had now disclosed, i.e., the percentage base was actual salary. Jaske testified that he told Kummer that he had sent the April 27 proposal to Kummer but Kummer had declined the offer to discuss it. The suggestion is that it was Kummer's fault for not perceiving a hidden change in the proposal not disclosed until after the News claimed deadlock. According to Jaske, Kummer said that he now understood the proposal but that Jaske did not understand that the unit members are extremely opposed to merit pay. He is not contradicted as to the membership opposition.

Despite the expression of dislike for merit pay by the Guild's constituency, like proposal 7, the Guild's negotiators

³⁹ In concurrent Free Press negotiations, a merit overtime exemption proposal was made and similar request of the Guild was complied with, but the exact details of that compliance and what was involved is unknown. However, both proposal and request were very similar in language.

opened the way for bargaining by asking questions about the merit pay proposal which they now realized had a different percentage calculating formula. Kummer asked for the amount of money in the merit pay pool, i.e., dollar value. Jaske answered merely by responding with percentages and telling Kummer that the Union was provided with periodic payroll information upon which they could make their own calculations. An internal News document dated April 25, 1995, produced under subpoena reveals an exact computation of the merit pool dollar value projected for each contractual year. Questions were asked by Guild negotiators concerning past managerial delinquencies regarding timely performance reviews and potential abuse of the system. The News negotiators stated that merit pay would be based upon performance reviews. The Guild negotiators again asserted that the Guild was not willing to agree to News' direct dealing with unit employees over merit pay, to which Jaske alluded to the proposal's nonarbitrable grievance provision. The meeting ended when Jaske asked whether the Guild had any new proposals on merit pay or overtime. Kummer responded: "We have no other proposals at this time."

On June 16, Kummer wrote to Jaske:

Please consider this as our request to meet for the purpose of negotiations regarding the Detroit News contract. Because of prior commitments the earliest we will be available is the week of July 3rd. I would suggest Thursday or Friday morning if that meets your schedule.

On June 20, Jaske responded by the following letter to Kummer.

I received your letter dated June 17 today. I cannot imagine what "prior commitments" you have that are more important than these negotiations.

In view of the deadlock in the negotiations resulting from your refusal to bargain on our overtime and other proposals, I see no justification for delaying negotiations until the week of July 3. Please contact me to set up a meeting for the next few days.

Further, I understood prior to the last meeting that you intended to bargain on pay and overtime. However, you made no proposals on these key subjects and I have never received any indication that you intend to bargain over them. Unless you can assure me that you intend to modify your position on those issues, we will have no choice but to implement our last offer to you. We do not wish to continue to postpone giving pay raises to Detroit News employees.

The International Union of the Guild had scheduled a national convention in Boston during the period from Saturday, June 17, through Saturday, June 24. Mleczko and Kummer, pursuant to prior commitment, would attend and were not due to return to their Detroit office until Monday, June 26. The convention had been scheduled several years in advance and notices of the event were posted on News bulletin boards to which News managers had ready access. Giles was most likely aware of the convention because he criticized the Guild negotiators in his memorandum to the staff dated June 28 for attending the convention instead of negotiating. Accordingly, it is most likely that Jaske was also aware of the reason for the absence.

Giles, by memorandum of June 26, notified the News editorial staff of the cancellation of the contract extension as of June 30 "because of the need to conclude the negotiations and move forward with the changes required in the bargaining agreements." He concluded:

The Guild has not asked for an extension of its contract with The News. It is unlikely that The News will get a new bargaining agreement with the Guild anytime soon. The Guild views our overtime proposal as illegal and has continued to reject our proposals on merit pay.

We have told the Guild that if negotiations remain deadlocked we will exercise our legal right to begin giving pay increases.

Giles issued a memorandum to the News' editorial staff on June 28. Jaske had seen and revised Giles' draft of the document before it was distributed to employees. The General Counsel notes that the 1-1/2 page discussion of the News' merit pay proposal disclosed more to the employees than anything that the News had provided in writing to the Guild itself. Giles stated therein: "Out of a professional staff of 176, nearly 90 percent would qualify for merit, based on evaluation ratings of 'outstanding' or 'commendable.'" The News had never indicated to the Guild bargaining team that as much as 90 percent of the unit might qualify for merit pay increase. Nor had the News ever disclosed to the Guild bargaining team that evaluations of "outstanding" and "commendable" would "qualify" an employee for a merit raise.

Giles ended the June 28 memorandum: "The deadlock in the negotiations has resulted from the refusal of the Guild to bargain on these proposals. Union negotiators have been at a convention and unwilling to meet."

Giles did not acknowledge therein that Kummer had a pending request dated June 16 to schedule another bargaining session, nor that the Guild had questions raised and pending and had indeed made suggestions and observations as to objectionable points. ⁴⁰ The next day, Kummer faxed a June 29 letter to Jaske, reiterating Kummer's June 16 request for a meeting and asking that the previously requested list of those unit persons "who could be exempt from overtime under [the News'] proposal" be furnished at the parties' next session, and stating that the Guild is willing to continue discussions on proposal 7. However, he made no explicit reference to Jaske's June 20 letter.

Jaske responded by letter of June 30:41

I answered your letter of June 16 on June 20 by asking for a meeting. You obviously had opportunity to schedule such a meeting but chose not to do so. The deadlock in negotiations has been caused by your refusal to bargain on our overtime proposal. As I told you at our last meeting, I cannot possibly provide the list that you request since the

⁴⁰ The Guild negotiating committee defended itself in a memorandum to unit members dated June 29. It denied that it was unwilling to discuss any proposals. However, it criticized the merit pay proposal as a subjective discretionary plan dependent upon Giles' whim; it criticized the wage pattern offered and the merit pool as Giles' slush fund. It called the overtime proposal "a Trojan Horse" designed to get employees to work for free, but it denied that deadlock existed and expressed willingness to negotiate.

⁴¹ On June 30, the Regional Director for Region 7 issued a complaint against the Guild alleging a refusal to bargain the overtime proposal. That case was settled in October 1995.

overtime proposal is optional for the employees, and we do not yet know which employees will come forward and request the exemption. As I also told you, exemption from overtime would be based on the employee's duties at the time of the request.

In the June 30 letter, Jaske indicated his availability to meet on Monday, July 3 at 10 a.m. He gave no explanation why he was not available for the Thursday or Friday dates of that week suggested earlier by Kummer. By now, Giles and certainly Jaske were aware of the convention which ended on Saturday. Yet, Jaske ignored the proposed dates and suggested an early Monday morning meeting.

Jaske caused the June 30 letter to be faxed Friday evening at 8:07 p.m. The Guild's principals had left for the weekend before the fax arrived. Although Kummer and Mleczko saw Jaske on Monday, July 3, at 1 p.m. at a meeting involving the Guild maintenance unit, Jaske said nothing at that time about his June 30 letter or about his proposal to meet at 10 a.m. that morning. According to Mleczko, neither he nor Kummer knew that Jaske had suggested meeting at 10 a.m. on Monday, July 3, until they saw Jaske's June 30 letter on Monday afternoon, July 3.

c. The implementation

On the morning of July 5, the News announced publicly at a press conference that it was implementing its merit pay and other proposals. Later, in the morning, some News editorial unit employees faxed to the Guild a copy of Giles' July 5 memorandum to the editorial staff unit members, which stated in part:

The Guild has not negotiated on the wage plan based on merit. . . . We have asked for meetings. The union has failed to appear. As you know, you are working without a contract.... We think it is unfair for your union to continue to deny you the pay increases you have earned through your performance. While we are willing to negotiate with the Guild, we feel we can wait no longer to give pay increases to our newsroom staff.... Therefore, this morning we are implementing our last contract offer. . . . This means that, as of July 5, 1995, you are working under conditions in which wages are based on merit. . . . During the coming days, your editors will be talking to you individually about the increase in your pay, effective July 5, 1995. You can have a union representative with you, if you wish. . . . I want to emphasize that we are taking this step of implementing our last offer only because of your union's failure to bargain in your behalf and because we feel we cannot wait any longer to give pay raises. We are prepared to resume bargaining with the Guild. [Emphasis added.]

On July 5, Jaske faxed a letter to Kummer characterizing the News' effort to meet with the Guild as "an effort to break to the deadlock that has existed in our negotiations resulting from your repeated rejection of our merit pay proposal and your claim that our overtime proposal is illegal." He notified Kummer that the News was implementing its offer to the editorial department effectively immediately, that pay raises would begin promptly and that because of the delay, they would not be retroactive. Jaske's July 5 letter constituted the News' first notice to the Guild of an intention to implement effective July 5. Kummer immediately responded. He faxed a reply on July 5, asking Jaske to "state each term and condition which you are changing as a result of implementing your offer." Kummer stressed that the contractual section 9 "direct dealing" waiver

was no longer effective. He further stated that "your unilateral implementation of a merit pay proposal cannot constitute a waiver of the Guild's right to negotiate, among other things, the timing and amounts of merit increases prior to their being granted to individuals. The Guild does not waive such bargaining."

Jaske responded by letter dated July 6, stating that the News was implementing proposals 1, 6, 7, 8, and 11 of their February 20 proposal. He pointed out that proposal 11 had been modified by the News' April 27 proposal. He stated that the News did not intend to bargain individually with employees and that a Guild representative could participate in any meeting with a Guild-represented employee concerning evaluations or pay increases, i.e., at employee request. He also stated that the News would inform the Guild of any employee seeking exemption from overtime.

The News prepared letters informing employees of their wage increases.⁴² These were given out in meetings held between approximately July 5 and 10, which were generally conducted by a department head. Before the start of the meeting, according to Giles' testimony, each employee was told that they could have a Guild representative present at the meeting if they so request. The Guild was not advised as to this procedure nor as to the amount of money being distributed nor as to individual meetings. One employee testified that he was not advised of his right to Guild representation.

The News' answer to paragraph 24 of the fourth amended consolidated complaint admits that it "unilaterally and without agreement with [the Guild], implemented a merit pay plan bargaining proposal including the amounts and criteria of merit pay raises to be granted to bargaining unit employees." It is uncontroverted that no bargaining took place between the News and the Guild with respect to the individual raises reflected in 171 pay determination notification letters distributed by the News to unit members evaluated in meetings from July 5 through July 11. All received the 1-percent minimum raise and 141 received some additional merit raise effective as of July 5.

On July 7, Giles sent letters to Kummer concerning employees who had sought information on the overtime exemption and the salary offered to those individuals. Each letter concluded by stating: "If you wish to bargain over this matter, please contact me immediately." The Guild has never requested to bargain over the timing and amounts of any of the merit increase that were given in the absence of restoration of the status quo ante, which request by the Guild was refused by the News. With respect to the merit raises granted, the recipients were advised in the notification letters that they would "receive a merit raise ... based on" their performance evaluation rating of either "outstanding" or "commendable." Those who were denied merit raises were denied such because of ratings of "acceptable," "unacceptable," or "marginal."

⁴² The process for determining merit increase was that the supervising editor and department head made a recommendation to Giles either for a dollar amount or a percentage increase. Giles then discussed the matter with them and reached a decision. Various factors were taken into consideration in determining a merit increase. These included the individual's performance rating, whether they had been hired in at a lower pay rate, additional responsibilities undertaken by the individual, recent improvement and other matters. There was no formula that was applied according to Giles' testimony.

The General Counsel points out that one merit pay letter to a newly hired unit employee stated more about the merit pay criteria than was ever disclosed to the Guild. It stated:

A decision on merit pay will be made following your first performance review. If you are rated "outstanding" or commendable," you will receive a merit increase as a direct result of your good performance. If you are rated "acceptable" or below, you will not be eligible for merit pay.

d. Postimplementation bargaining—the July 10 and 11 bargaining sessions

The parties next met on July 10 at a hotel. Jaske, Giles, and attorney Taylor as notetaker attended on behalf of the News. In addition to the Guild's normal committee, Duane Ice, an attorney who had represented the Guild for 20 years, attended this meeting and was the Guild's chief spokesperson. Ice began the meeting by stating that he did not believe that the negotiations were deadlocked and that the Guild desired to bargain despite the News' implementation. Jaske responded that they were deadlocked. Ice and Jaske discussed what had been implemented

Ice asked questions regarding the overtime exemption and merit pay proposals beginning with the overtime exemption issue. Ice testified that the Guild was concerned that it had no idea of the scope and impact of the proposal. He testified that he sought "some idea" of the News' position as to "how broad and wide it intended to carry this exemption notion," i.e., 10, 100, or 200 employees. Accordingly, the Guild pursued its Department and Labor advisory opinion proposal, which Jaske rejected as too cumbersome and time-consuming. Ice also asked questions about the exemption process. Ice admitted stating in negotiations that "few if any would qualify."⁴³

Ice asked about the operation of the exemption application procedure, and a discussion ensued over whether the employee in fact initiated the process because Ice told Jaske he had reports to the contrary. Jaske responded that he would investigate the Union's reports that management had initiated some applications, but he gave Ice no other information on the application procedure itself.

Ice asked for a list of employees who the News considered would be eligible for the exemption on the assumption that all unit employees would apply and that they all had the same duties. This, he concluded, countered Jaske's previous objections to Kummer's requests. Jaske admitted that Ice explained in negotiations that it was not the identity of the employee that was so critical but that such information was felt necessary by the Guild in order to gauge the impact of the proposal. Jaske refused this and subsequent requests. At first, he characterized it as a request for information the News did not possess and could not obtain. Thereafter, he characterized the amended request as calling for a pointless, burdensome task which the News had no intention of pursuing, i.e., they could but would not do it.

Ice asked for information as to how the salary in lieu of overtime would be determined, and whether the increase in pay would be equal in dollar value to past overtime pay received by the employee. Jaske promised "to get back" to Ice but gave no explanation. Jaske did give an explanation of the word "prereq-

uisites" in the last sentence of proposal 7. Ice asked whether the determined in-lieu-of-overtime salary of the seven applicants who so far applied included merit pay raises. Jaske promised to "check" and "get back." Ice asked who will make the determination and what basis will be used and would there be a formula. Jaske responded that management would make the ultimate decision. At that point, they discussed the Union's suggestion that a neutral entity make the decision such as the Department of Labor.

Ice explained the Guild's concern over what it perceived might be management's tendency to prefer overtime exempt employees for assignments involving overtime hours and proposed some preference or protection for nonexempt employees, to which Jaske did not respond but promised to consider.

The parties next focused on merit pay. 44 Ice stated that he understood that the News had been conducting individual performance review, merit pay evaluation meetings with employees and had effectuated merit raises. Jaske responded yes, raises were given and meetings were held but employees declined the News' offer for Guild representative participation. Ice stated that the Guild wanted to bargain the amounts of each raise and wanted involvement in the bargaining thereof and that it was insufficient notice to bargain to the Unions by merely offering the employee the opportunity to invite a Guild representative. Jaske asked if the Guild wanted to know "when, where, and who." Ice said "yes," and Jaske promised to comply and to provide requested names, classifications, amounts of raises granted, copies of letters to employees concerning merit pay raises, and any evaluations upon which merit pay was based. That was ultimately provided.

Ice then asked whether there was any formula used to determine merit pay raises and whether performance evaluations were utilized. Jaske promised to provide the information. Ice asked whether any kind of formula was used or intended to be used which factored in specific performance ratings for specific amounts, e.g., outstanding = x percent; or whether there were variations determined by employee classification. Ice asked whether the merit raises under the implemented proposal affected past bonuses given pursuant to the expired contract's waiver clause. Jaske promised to respond. Ice proposed a flat \$75 weekly pay raise for the same contract term agreed with the Council of Unions, or the same wage raise pattern bargaining by the Council, or the adoption of the Council's agreement with the News on the 13 reserved economic items. He received no response. The meeting ended.

The parties met again late in the afternoon on July 11. Jaske offered responses to Ice's questions of the previous day. He stated that a salary for those deemed professional was reached by taking into account the base salary, prior overtime and future anticipated overtime. He rejected the Guild's proposal regarding overtime assignments and pledged that the News would be influenced in distributing such work by experience and not salaried status. He said that there was no formal application procedure and that interested individuals would come forward to apply for salaried status on their own.

⁴³ Ice demanded to bargain over each overtime exemption determination but suggested a two-level bargaining process, i.e., a separate bargaining for the contract itself. Jaske apparently agreed.

⁴⁴ I credit testimony which is not explicitly contradicted or is not mutually inconsistent or mutually exclusive. I discredit testimony of Jaske which is contradictory or inconsistent with Taylor's notes where they corroborate Ice. Where Ice's more detailed testimony covers a point, I credit him over the less detailed testimony of Jaske where there is inconsistency, or where Jaske is silent.

With respect to merit pay, Jaske said on July 11 that he understood the Guild wished to be more involved. He promised to cease future merit pay increases under the implemented proposal to allow the Guild greater participation. ⁴⁵ Jaske described the merit pay formula as "not rote." The unit would receive in the aggregate an average raise of 4-percent, 3-percent, and 3-percent over the next 3 years. The News would look at individual contributions and capabilities. Higher performance ratings, Jaske said, would result in more merit money than lower ratings. The News would tell employees how to improve to earn more merit money. Jaske rejected the Guild's wage offers made July 10.

After a union caucus on July 11, Ice renewed questions about the implemented overtime program. He asked which News managers would be making the salary determinations. He asked exactly how the News would use past overtime. For example, Ice noted, employee Jon Pepper had a record of zero past overtime earnings, yet he was offered a salary increase. He asked if the News would be willing to discuss a concrete formula. Jaske did not respond. Ice's questions were unanswered; Jaske was called away to another negotiation meeting emergency for which he later apologized to Ice. Giles testified at trial that Pepper's salary increase was predicated upon management's belief that Pepper had in fact worked overtime in the past but had chosen not to claim it.

On July 11, Kummer wrote two letters to Jaske. In one, he reiterated the request for a list of names of unit employees who the News considered to be qualified for the FLSA exemption. He went on state:

The News must have some understanding of the impact and scope of its proposal. I am, therefore, requesting this information again. It is not credible that the News has no idea who might qualify under the proposal it drafted and submitted.

So that you cannot evade the question, let me put it this way: assuming that all employees in the Guild's bargaining unit sought exemption from overtime and assuming their duties are the same as they are today, which employees would the News exempt from overtime under its overtime proposal?

In his second letter, he reiterated Ice's July 10 request for other information not yet supplied, e.g., job classification and amounts of raises given, etc. Taylor complied by letter of July 21. Therein, he did not provide the list of names as requested but instead cited 11 classifications covering 170 employees of a unit of 200 employees which still gave the Union no clear idea of the scope and impact of the implemented proposal because there is no evidence of any precedent to justify such a comprehensive exemption class.

On August 4, Kummer wrote to Taylor and characterized his July 21 response as inadequate with respect to advising the Guild as to "the scope and impact of your proposal and the News' position as to who would be exempt." He demanded citation of some authority to justify the breath of the classifications cited by Taylor. He again reiterated the original request.

On July 11, as the Guild's negotiator was seeking information as to proposals 7 and 11, it was unaware that Giles had

issued yet another bargaining progress informational message to the staff which contained information not disclosed to the Guild by Jaske, who himself had previewed the same document, despite Ice's specific questions of him.

Giles informed the unit employees in the memorandum that 80 percent of them had "qualified" for merit pay. He divulged that the average raise for those rated "outstanding" had been 4-percent and for those rated "commendable," 3.5 percent. He let it be known that the merit increases ranged from 3-percent to 6.8 percent. He said that most of the merit pool money had been distributed; the moneys remaining were for new employees who would have their first evaluation in the coming months. Regarding the computation of a salary in lieu of overtime, Giles wrote to the staff that future overtime earnings would be projected based upon their experience in the first 6 months of 1995. There is no record evidence that Jaske offered the Guild that precise formulation, even though Ice asked repeated questions on that very subject on July 10 and 11.

On August 2, 1995, Jaske wrote the Guild asking for any proposals they have regarding merit raises given or proposed. He also asked if the Guild had any objection to the increases proposed for eight specific individuals.

Kummer wrote to Jaske on August 4, stating that the Guild had no objection to increases for individuals listed in Jaske's August 2 letter but desired to meet and bargain regarding timing and amounts. He also expressed a desire to meet regarding any increase not yet given. He stated:

As to those [merit increases] already "given," I do not see how we can bargain them when the News has already unilaterally established the timing and amounts of those raises, discussed those raises individually with Guild members and granted them. As to raises "proposed," we desire to meet and bargain prior to the granting of any increase to any individual.

Jaske responded by letter dated August 5, stating:

Contrary to your letter concerning raises already granted, we did not establish the timing and amounts unilaterally or discuss them individually with Guild members without first giving you ample opportunity to bargain. Our proposal of April 27 clearly gave you the right to grieve timing and amount of increases. You flatly rejected that proposal. Since its implementation you have not grieved any of the raises or their timing. Each individual given a raise was also given the opportunity to have a Guild representative with them.

As our April 27 proposal clearly indicates, you continue to have the right to bargain on raises granted or proposed.

He proposed an August 16 meeting.

The parties next met on August 17 at the Federal mediation offices in Detroit. With the exception of Ice, the regular committee members were in attendance. Charles Dale, president of the Guild International Union, and Kummer were the main spokespersons for the Guild. The meeting began with Statham, ⁴⁶ the mediator, asking the parties to review their respective positions. Kummer said that the Guild continued to reject the News' overtime proposal and viewed it as illegal. Jaske explained that the parties had deadlocked over overtime,

⁴⁵ The News has not rescinded the 171 unilaterally granted increases that were effective July 5, nor or does the News claim to have so offered.

⁴⁶ The mediator is incorrectly referred to in the transcript as Mr. Stafen.

merit pay and health insurance. They then went through the various proposals that were still on the table and other contract sections opened by the proposals.

The parties met again on August 22. Dale was the chief spokesperson for the Guild. He proposed that the News drop all of its noneconomic proposals and that the Guild drop all of their noneconomic proposals and that economics be submitted to the joint Council and whatever they agreed upon would be the economics for the Guild. After a caucus, Jaske responded that the News was not interested in turning their negotiations over to the Joint Council and had to negotiate their own contract. Jaske asked if the Guild wanted to negotiate as to the merit pay increases that had already been given. Dale responded that they viewed the News' position as illegal and therefore were not in a position to respond.

The parties met again on October 16 and 17 for the limited purpose of discussing the merit increases and overtime. Ice was the Guild's chief spokesperson at both these meetings. They reviewed what had occurred up to then. Jaske asked if the Guild desired to bargain about those increases already effectuated. Ice responded that the News would have to first rescind the increases. When Jaske replied that the News was not interested in doing that, Ice said that the Guild would not bargain regarding any increases already put into effect but would bargain prospectively on proposed individual raises.

The parties discussed those individuals whose increases had not yet been put into effect but who had been put into abeyance. The Guild asked questions about whether the News had used a formula with regard to those increases and whether some matrix or grid was used to come up with the increases. Jaske responded that there was no such matrix or grid and that the News had based these on "the evaluations, on the persons' contribution, capabilities." He explained that there was no formula and no percentage applied to a particular classification. The Guild again proposed that the individuals each get an across-the-board increase of \$75. Jaske responded that the \$75 was too large and did not deal with merit and therefore rejected the proposal.

The Guild repeated their prior question as to who would be exempt from the identification of employees who the News felt would be exempt from overtime. Ice asked: "assume that everybody applied today. Who would be exempt?" Jaske responded that he saw no purpose in trying to go through that exercise, which would require the News to evaluate the duties and responsibilities under the law of a large number of people, since he asserted it was not something that was likely to come to pass. Ice also asked who would make the initial determination with regard to who might be exempt from overtime. Ice again suggested going to the Department of Labor for a determination. Jaske said that he would respond to various questions from the Guild the next day.

When the parties met again the next day, Jaske responded to some of the Guild's questions and proposals from the previous day. He turned down the \$75 proposal. He also stated that he did not feel that going to the Department of Labor for a determination as to exemption from overtime was the proper way to proceed. Ice proposed uniformity between classifications on the basis of ratings for increases. He pointed to two employees—House, a reporter, and Jones, an editorial assistant—and asked why House was getting a greater percentage increase even though he got the same evaluation. Jaske replied that there was no intention on the part of the News to have consistency as to

classification. Ice argued that a reporter has a higher base pay and will get a higher raise and therefore the percentage should be the same. Jaske argued further that the reporter classification is the "lifeblood" of a newspaper and should receive a higher percentage raise. He thereby inadvertently disclosed something the Guild had yet to learn and had asked about before, i.e., at least deference was attached to classification when determining merit pay raises.

During this meeting or the day before, Ice had proposed that only evaluation of less than 3 month's age be relied upon and had asked that a particular employee be reevaluated. Jaske, however, responded that the employee had not asked for a reevaluation. The clear implication that the Union had no standing to independently request such reevaluation was reinforced by subsequent correspondence. Ice thus gained another information tidbit about pay program. Jaske testified that he did agree with the Guild's proposal that stale evaluations not be utilized. However, he rejected Ice's proposal that those rated "acceptable" should be eligible for merit pay. During this meeting, Ice reduced the Guild's proposal from \$75 weekly increase for all individuals to \$64. The News rejected the proposal since it was an across-the-board increase which did not address merit.

The parties met again on November 1. This meeting dealt exclusively with overtime issues. By way of example, the Guild asked about how the News had come up with an overtime proposal for unit employee Pepper. Jaske responded that the News had looked at what Pepper might have overtime in the future, since there was no record of overtime in the past.

When Ice asked who would make the determination on overtime to compute a salary, Jaske responded that the editors would make the initial determination as to whether an individual should be offered a salary and what it should be and then bargain with the Guild about it.

The parties met on May 9, 1996, at which the second round of merit increases was announced as due on May 1, 1996. The parties discussed certain individual merit pay proposals. Ice noted what appeared to be reverse results in amounts in relation to evaluation ratings which were defended by Jaske as "judgment of management." Jaske stated that performance ratings were not necessarily tied to percentage increases. This baffled and astounded Ice who demanded that Jaske define exceptions to what he understood was the underlying premise that increase in pay was proportionate to higher ratings. Jaske merely stated that it was a determination made in the discretionary judgment of management. Jaske further stated that there was no range of percentage raises set for each evaluation rating and that an employee rated outstanding could receive anywhere from 0 percent to 20-percent raise. This announcement ran contrary to Giles' staff memoranda, the merit pay letters to employees and Giles' testimony that all employees rated outstanding or commendable received a merit pay raise in 1995. Furthermore, Jaske now also announced that even employees rated as "acceptable" were eligible for a merit raise, if it was decided appropriate by management. When the Guild negotiators noted that the News was proposing no second round merit raises for any employee rated "acceptable" and asked if that were a result of a rule, policy or coincidence, Jaske answered that it was just

When the parties met again on June 13, 1996, Jaske again reiterated that the merit pay determinations were management's "individual subjective call."

Finally, the Guild was informed for the first time at trial, when Jaske testified that even if the merit pool moneys were exhausted, Giles would "find the money from somewhere," to prevent a valued employee from being recruited by a rival employer.

e. Television assignments

In 1994, Channel 50 (a local television station) expressed an interest in having News reporters and editors participate in their 10 p.m. broadcast. Channel 50 wanted to do live or film tapings from the newsroom with a News reporter discussing a story that was going to be in the next day's paper. In late September 1994, the News entered into an agreement with Channel 50 for reporters and columnists to appear on Channel 50. This was initially voluntary program, which later be came mandatory.

Pursuant to the Guild's request to bargain about the onsite television work, the parties negotiated regarding this matter on November 4, 9, and 10, 1994. In the negotiations, the News expressed opposition to the Guild proposal to pay an appearance fee for appearing on camera. At the end of the third negotiating session on November 10, the News declared an impasse and began assigning Guild members to present their work on Channel 50.

In response, the Guild filed an unfair labor practice charge. Complaint issued. The issue was whether the News had the right to compel reporters to appear on television without receiving any additional compensation.⁴⁷ The News' position was (1) that its actions were appropriate under the management rights clause of the then-existing collective-bargaining agreement and (2) that they had reached a valid impasse and therefore could unilaterally implement their proposal.

While the unfair labor practice charge was pending, the News and the Guild began negotiations for a new agreement. In order to avoid any question as to the News' right to assign employees to perform various functions, including television appearances, the News made a proposal (item 8) which recognized that individuals who gathered the news "needed to be able to accept assignments in which their reports would be distributed in a variety of ways," including CD-ROM, the Internet, television, etc. On March 8, Kummer wrote to Jaske requesting information, including about the television appearance policy. However, the Guild never raised the Channel 50 cases at any time at the bargaining table during negotiations.

By letter dated December 8, 1994, the News accused the Guild of encouraging unit employees not to participate in Channel 50 broadcasts. The News construed that alleged Guild effort as a breach of the contractual no-strike clause and demanded monetary damages and a cessation of the alleged Guild conduct. When negotiations for a successor contact began in March 1995, also pending were the News' demands in respect to the Guild's alleged breach of the no-strike clause.

On April 14, the News filed a formal complaint against the Guild in U.S. district court, contending, inter alia, that the Guild was in breach of the parties' no-strike clause by encouraging employees not to participate in the Channel 50 broadcasts. The

Guild raised a preemption defense affirmatively in its May 18 answer to the complaint. News negotiator Jaske made only a cursory reference to the News' proposal 8 on May 3, after the brief summarization of issues at the March 22 initial meeting.

On July 5, after claiming an impasse on a number of issues, the News notified the Guild that it was unilaterally implementing its last offer. The News informed the Guild that among the proposals being implemented was proposal 8, dealing with the assignment to news and information projects. Despite notifying the Guild of the intent to implement this proposal, there have been no televised news broadcasts on Channel 50 by employees of the News since at least July 13.

Administrative Law Judge Stephen J. Gross issued his decision and recommended Order on July 14. He found that the News violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with the Guild and by implementing new terms of employment without having reached either agreement or impasse. In so holding, he ruled that the management-rights clause, on which the News relied, did not, in fact, permit the News to unilaterally assign unit employees on-camera work. He also ruled that the News bargained in bad-faith regarding the issue of appearance fees. Finally, he found that even if the News' bad-faith bargaining did not preclude genuine impasse—which he found that it did—the News, nonetheless, failed to establish that true impasse occurred.

On July 21, John Taylor wrote to the Guild stating:

as you know, the Board has supported your position with regard to the "TV 50 case." We will comply with the Board's decision and will so notify all employees in accord with the Board's decision.

Taylor testified at the instant trial that his responsibility regarding "compliance" was limited to assuring that notices to employees were posted. He admitted that he did not sign the required notices and submit them to the Board's Regional Office until November. He testified that he did not want to know who at the News was delegated the task of securing compliance with other features of the Board's remedy.

By letter dated August 4, the Guild wrote to the News as follows:

the News improperly insisted on a proposal giving it the unilateral right to assign TV work, at a time when it has been found to have been committing an unfair labor practice concerning that very subject. This is to request that you immediately rescind implementation of your last offer, notify the Guild and the employees that you have rescinded your implementation, remedy the prior and continuing unfair labor practice of which the News was found guilty on July 14, and then bargain in good faith with the Guild concerning TV assignments. . . .

On the News' behalf, Jaske replied on the same date. He asserted that the Guild had "ample opportunity to present proposals [on the television appearance issue] but chose not to do so." He went on to declare that negotiations had deadlocked over "overtime and pay." Jaske ended the letter by agreeing to bargain if the Guild wished to make further proposals on the issue of television appearances. ⁴⁹

⁴⁷ That case, 7–CA–36657, is not involved in this proceeding.

⁴⁸ Giles and Taylor testified that as of July 13—the date of the strike—the arrangement between the News and Channel 50 was canceled, and onsite telecasts were discontinued. There is no record evidence to dispel the inference, however, that broadcasts continued until July 13, nor is there any record evidence that the News ever advised the Guild that on-air work was no longer being assigned.

⁴⁹ The News continued to maintain in its Federal lawsuit that art. 13 of its now expired agreement gave it the right to assign television broadcast work to its employees and filed an amended complaint in the same action on September 11.

3. Analysis

a. Merit pay implementation

(1) The McClatchy theory

In *McClatchy II*, the Board, responding to the D.C. Circuit's instructions on remand, explicated a new analysis in support of its finding that the respondent employer violated Section 8(a)(5) and (1) of the Act by the unilateral implementation of a merit pay increase proposal despite a lawful bargaining impasse. It reasoned as follows:

In brief, we find that the preservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay.

. . . .

Specifically, were we to allow the Respondent to implement without agreement these proposals, such that the employer could thereafter unilaterally exert unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria, the fundamental concern is whether such application of economic force could reasonably be viewed "as a device to [destroy], rather than [further], the bargaining process." [W]e find that if the Respondent was granted carte blanche authority over wage increases (without limitation as to times, standards, criteria, or the Guild's agreement), it would be so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining. 321 NLRB 1386, 1388 (1996) (fn. citations omitted).

In McClatchy III, the Board described the facts before it as follows:

In short, after the contractual parties bargained unsuccessfully for 3 years for a successor collective-bargaining agreement, the Respondent unilaterally implemented its final negotiating offer on May 21, 1990. There is no dispute that the parties' bargaining had been in good faith and that a lawful impasse had been reached before implementation. The final offer provided, inter alia, for salary increases based on merit; they were to be determined at the Respondent's sole discretion, based on its annual evaluation of job performance. Pursuant to these terms, the Respondent' granted merit increases to 77 unit employees between May 21, 1990, and the time of the unfair labor practice hearing. Consistent with the implemented provisions, the Union's role in the merit increase procedure was limited to those situations in which a unit employee chose to appeal a merit increase determination and further chose to request representation by the Union in the appeal process.

The Board went on to find:

On October 12, the Board affirmed the administrative law judge's Decision and Order and modified its recommended remedy to include a status quo ante Order. *Detroit News, Inc.*, 319 NLRB 262 (1995). On October 16, the News stipulated to a voluntary dismissal, with prejudice, of its breach-of-contract district court lawsuit.

The instant case is controlled by the Board's decision in *McClatchy II*. The Respondent's obligation was to negotiate to agreement or to impasse "definable objective procedures and criteria" governing raises under its merit pay proposal prior to implementation of the proposal. As in *McClatchy II*, "no such substantive negotiations ever occurred."

. . . .

Consequently, the unilateral implementation of the Respondent's discretionary merit pay plan was inherently destructive of the statutory collective-bargaining process, and an exception to the postimpasse implementation rules is therefore warranted. Accordingly, and as more fully explained in *McClatchy II*, we affirm the judge's conclusion that the Respondent violated Sections 8(a)(5) and (1) in view of its failure and refusal to satisfy its obligation to bargain with the Union prior to granting merit wage increases to unit employees.

In McClatchy II, the Board considered that the merit pay proposal would permit the employer to exert "unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria," which it conceded probably would not be entirely arbitrary, but which proposal did not require a statement of criteria or standards upon implementation. 321 NLRB 1386, 1390. The Board concluded that were it to permit implementation, the union would not be able to bargain knowledgeably nor have any impact on the determination of unit employee wage rates. It noted, however, that its decision did not preclude an employer from "attempting to negotiate to agreement on retaining discretion over wages increases [and] absent success in achieving such an agreement, nothing in our decision precludes an employer from making merit wage determinations if definable, objective procedures and criteria have been negotiated to agreement or to impasse." It found that no such negotiations had occurred. It further found that the employer refused to allow the union to negotiate procedures and criteria, but also failed to provide to the Union notices of forthcoming specific merit wage increases or to allow the union participation on any appeal of merit pay other than upon invitation of the individual employee. Id. at 1390-1391.

Respondent argues that the facts of this case are distinguishable from *McClatchy* and *Colorado Ute*, supra, in that its proposal did not constitute an attempt to cause the Guild to relinquish its statutory role, i.e., there was provision for the Guild's involvement in the evaluation and appeal process and, further, the proposal was not entirely for merit pay only and the Guild, it claims, could calculate the amount of merit pool money by virtue of its percentage of employees' salaries.

I agree with the General Counsel and the Guild that the facts of this case do not distinguish it from the *McClatchy Newspapers* precedent but rather emphasize its similarity, e.g., lack of notification as to specific unilaterally determined merit increases; Guild participation in a nonbinding appeal process but only upon invitation of the affected employee and a nonarbitral pay determination. An after-the-fact offer to negotiate without status quo ante restoration did nothing to rehabilitate the harm done to the Guild's representational status.

It is clear from these facts that not only was there no meaningful bargaining of a statement of definable criteria or standards prior to implementation, but that whatever obtuse responses Jaske gave in persistent requests for information were confounded by his postimplementation representations, particularly in 1996.

I find that even had the News bargained to good-faith impasse, the implementation of its merit proposal was inherently destructive of the Guild's representational status and violative of Section 8(a)(5) and (1) of the Act under the *McClatchy Newspaper* cases rationale.

(2) Impasse issue—merit pay

Alternatively, I find that the parties did not bargain to a good-faith, bona fide impasse on July 5.

Unilateral effectuation of terms and conditions of employment that constitute mandatory bargaining subjects prior to bargain impasse is proscribed by the definition of good-faith bargaining. *NLRB v. Katz*, 369 U.S. 736, 745 (1962). The Board, as noted in the foregoing discussion regarding DNA negotiations, evaluates several factors in determining whether negotiations have "exhausted the prospects of concluding an agreement," and whether stalemate has been reached, one of which is the good faith of the parties. *Taft Broadcasting Co.*, 163 NLRB 475, 478, petition to review denied 395 F.2d 622 (D.C. Cir. 1968).

An analysis of impasse accordingly necessitates an analysis of the good-faith context wherein it is declared. *Assn. of D. C. Liquor Wholesalers*, 292 NLRB 1234, 1255 (1989), enfd. 294 F.2d 1078 (D.C. Cir. 1991).

The burden of proving that an impasse exists is borne by the asserting party. *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992).

The Respondent characterizes the Guild as being "pathologically" opposed to merit pay, yet refers to its own unwavering refusal to discuss a flat rate pay raise only proposal as legitimate firmness.

In Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984), the Board stated:

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." The employer, is nonetheless, "obliged to make some reasonable effort in some direction to compose his differences with the union, if [Sec.] 8(a)(5) is to be read at imposing any substantial obligation at all."

It is necessary to scrutinize an employer's overall conduct to determine whether it had bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." A party is entitled to stand firm on a position if he reasonable believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. . . .

Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith . . . other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in manda-

tory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. . . . [Citations omitted.]

Thus, although adamancy is not itself a determining factor, it may be a factor in consideration of a bargaining party's total behavior at and away from the table.

Respondent argues that its firmness on the merit pay proposal as a "key issue" militates toward rather than against a finding of impasse, especially in light of the Union's indication it would not accept the Company's proposal," quoting E.I. du Pont de Nemours, 268 NLRB 1075, 1076 (1964), and West Virginia Baking Co., 299 NLRB 306, 325 (1990). In the latter case, however, it was found that although both parties' intentions as to the employer's proposal were fixed early on, the employer "repeatedly expressed its willingness to discuss any and all aspects of the proposal." Further, "the Company answered all of the Union's questions." In the former case cited, the Board noted that the employer's good faith was not disputed; "that after the long hard negotiations, the parties were still not close to reaching agreement," and the union had given no indication of any willingness to concede.

In this case, the News' good faith is clearly lacking at, and away from the bargaining table; there was no long, hand bargaining on the merit pay per se; and the Guild was deprived of information necessary for it to bargain intelligently and meaningfully.

The News' bad faith is evident from the way Giles sought to disparage and misrepresent to the unit employees the Guild's bargaining position in his bargaining status memoranda to the unit employees. Bad faith was also evident with respect to the aborted July 3 meeting. I conclude that the facts fully support an inference that the News seized upon the Guild negotiators' long planned Boston, Massachusetts convention absence to suggest a meeting 3 days earlier than the Guild negotiators had suggested, at a foreseeably most inconvenient time to the returning negotiators. That manipulation is further compounded by the device of a late Friday evening mailing of that suggestion to a weekend closed union office. To top that off, Jaske was silent about the negotiators' nonappearance when he met the Guild negotiators on Monday on another matter. After that, the News had the temerity to state both in memoranda to staff and at trial in Jaske's testimony, later recanted, that there had been a meeting set, i.e., agreed upon, and that the Guild negotiators simply failed to appear. After this clever maneuver, the News rushed to implementation on July 5 after having had only two discussions of any length of the merit pay proposal on April 25 and June 14. Further, bad faith can be inferred from the failure of Jaske to clearly explain the full significance of the April 27 proposal and not to do so until after the Union had presented the original proposal to members and after Jaske had declared deadlock at the beginning of the next meeting.

As of July 5, Respondent had furnished to the Guild only two written descriptions of its proposal. It is clear from the onset of negotiations that the Guild wanted to know as much about the proposed merit program operation and nature as it could, and not just a rigid "formula," and that Jaske was well aware of it. Not only did Jaske not fully respond to the Guild negotiators' questions, the News later actually volunteered more information about the proposal to the Guild's constituency than it did to their negotiating representatives. When first asked about the cost factor, Jaske said it had to be calculated.

When asked later on June 14 about the amount of money in the merit pay pool, Guild negotiators were given only percentages and told to make their own calculations despite variable factors, when the News already had a detailed, internal cost projection. Combined with the accompanying disparagement and misrepresentation of Guild bargaining positions, the News' conduct supports an inference of calculated intent to undermine the Union's bargaining position and representational status.

I find no merit to Respondent's attempt at exculpation by arguing that the Guild negotiators failed to ask specific questions. It is clear that they wanted full disclosure as to cost, timing, criteria and procedures. Without some understanding of those factors, the Guild could not bargain intelligently about a program that before July 5 was not described by the negotiators or in staff memoranda to be totally arbitrary. A union is entitled to information helpful to bargain meaningfully. Circuit-Wise, 306 NLRB 766, 768-769 (1992); Dependable Maintenance Co., 274 NLRB 216, 219 (1985). The News suspected that the Guild members were reluctant to accept a totally arbitrary plan. It was well aware that it was critical for Kummer to be able to present the proposal to the members with as much of discretionary moderating factors of which he was aware. By withholding requested information and by failing to volunteer information, the News deliberately maneuvered the Guild negotiators into a position it very well should have expected it to take in the absence of needed information, i.e., opposition, so that the News would be free to speedily implement the merit pay program with a minimum discussion. Cf. Asociacion Hospital Del Maestro, 317 NLRB 485, 539 (1995), enfd. 77 F.3d 460 (1st Cir. 1996); see also Orthodox Jewish Home for the Aged, 314 NLRB 1006, 1008 (1994).

The facts do not support a conclusion that the News made "some reasonable effort in some direction" either to promote the meaningful dialogue or to explain its proposal prior to the declared impasse. Its postimplementation representations as to the breadth of the discretionary element clearly frustrated any Guild understanding of just how merit pay was determined, which employee would get what amount of money and when. The facts rather fail to establish that the News negotiated in good faith while maintaining its adamant position.

The Respondent argues that the Guild was so opposed to any merit plan that further bargaining was futile. First, as already noted, necessary information was withheld from it. Second, it is undisputed that the Guild was negative in its stated position as to the merit format proposed, but the evidence does not justify the News' perception that the Guild would not agree to discuss and bargain about any form of merit pay, and perhaps one with more definable criteria and less managerial discretion. The other Guild units had agreed to some form of merit pay in the past. Giles' own negotiation propaganda dated June 29 addressed to unit members pointed out that merit pay provisions had been agreed upon in other "Guild" contracts for newsroom employees at newspapers in Milwaukee, Wisconsin; Indianapolis, Indiana; Rochester, New York; Santa Rosa, California; and Time Magazine.

A certain amount of posturing and rhetoric is to be expected, especially in the early stages of negotiations, but such initial opposition must be interpreted in the context of ongoing expressions of a willingness to negotiate especially where, as here, continued questioning of the nature of the proposal persisted. Compare Association of D.C. Liquor Wholesalers, supra at 1235 to 1236. As found above, the Guild negotiators never

"flatly" refused to consider any merit pay plan or to bargain about it. But because they expressed dislike of the one that was so vaguely proposed in the few meaningful discussions that took place, it does not mean that the Guild's offer to negotiate further was hollow, particularly if specific criteria, timing of distribution and dollar value factors were identified, and as to its greater involvement in the process. Indeed, although the Guild did not make formal counterproposals, it raised specific concerns that warranted News' response and further negotiations

Respondent argues that the parties had reached impasse on proposal 7, overtime exemption, which additionally and independently entitled it to implement the merit pay proposal. Respondent argues that the Guild had refused to bargain about what it perceived was an illegal proposal. The Guild did take an initial position that the subject was nonbargainable. However, as found above, they opened the door to negotiations on June 14 by raising a series of questions as to how the proposal would be effectuated, and as to how it would work both as to the application process and determination of eligibility. The Guild made an offer as to determination of eligibility by a neutral agency. The Guild asked the News to identify who they thought would qualify. On its face, even without subsequent elucidation by Kummer and Ice, this request is an attempt to ascertain the scope and impact of the proposal with consequent dollar value significance. Further, the Guild raised concerns about its own apparent lack of meaningful involvement in the process which, like merit pay evaluations, was dependent upon employee invi-

Thus, by June 14, the Guild had asked sufficient questions and raised concerns that needed to be addressed in further negotiation. I therefore conclude that no impasse existed on July 5 as to proposal 7. Further, the News' bad-faith in claiming premature impasse on merit pay further contaminated the bargaining context to preclude a good-faith impasse.

Finally, there existed on July 5, unremedied unfair labor practices to be discussed.

b. Proposal 8-implementation

The General Counsel and the Guild argue that the News was obliged to comply, but failed to comply with the Board's status quo ante remedial Order of October 16 and that at least up to July 13, had continued its unlawful television assignments. They conclude, and I agree, that therefore on July 5, the time of the alleged impasse, there existed unremedied unfair labor practices which precluded good-faith impasse. They appropriately cite *Noel Corp.*, 315 NLRB 905, 911 (1994), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996); *Circuit-Wise, Inc.*, 309 NLRB 905, 919 (1992); *C.J.C. Holdings*, 320 NLRB 1041, 1044 (1996).

The unfair labor practices found by the Board were serious and extensive and necessarily tended to adversely affect the bargaining atmosphere and the relationship between the parties. Within the context of the News' afore-described conduct, the existence of such unremedied unfair labor practices further mitigate a finding of good-faith impasse on July 5.

The finding that no good-faith impasse was reached on July 5 renders untenable the News' defense theory. The News argues that the July 5 impasse on proposals 7 and 11 justified the implementation of all its preimpasse proposals, citing *Western Newspaper Publishing Co.*, 269 NLRB 355 (1984). From there, it reasoned that because subsequent good-faith impasse was

reached, a status quo ante remedy was not warranted, citing *NLRB v. Cauthorne*, 691 F.2d 1023, 1025–1026 (D.C. Cir. 1982), and *Storer Communications, Inc.*, supra. Since I find that there was no good-faith impasse on proposals 7 and 11 proven by the News, the theory has no factual support, and there is no need to evaluate the validity of the cited precedent to these facts where the subsequent bargaining and impasse did not involve proposal 8, which was in significant part the subject of the unfair labor practice determination.⁵⁰

c. Post-July 5 information requests

(1) Merit pay

The News argues, much as it does with respect to the preimpasse information requests for the merit pay proposal information, that it satisfied those requests by explaining to the Guild that there was no formula used to determine merit pay and none could be given. With respect to criteria or factors such as a particular rating, it argues that such information could not be given because that criteria did not "guarantee" merit pay or the amount of merit pay and that consistency between classifications was not its intention. The Guild sought to know not whether there were any guarantees, but just what were definable criteria, i.e., factors considered or guidelines upon which determinations were made. The Guild was led to believe in negotiations before 1996 that somehow there was a relationship between evaluations and merit pay determinations which was not purely arbitrary. The Guild was not given even the limited information the News provided in its staff memoranda. Surely the News does not take the position that it sought to give the impression to the unit employees that the merit pay proposal fairly utilized some kind of observable phenomena as criteria, while at the same time, it told the Guild that it had no specific criteria to disclose.

With respect to classification relationship to merit pay, Jaske disclosed that it indeed was a relevant factor, one which it had not earlier disclosed, at least with respect to the reporter classification.

The Respondent argues that the Guild had known the relationship between performance evaluation guidelines and past merit pay and how it operated and therefore "the Guild's claims that they were not given information about the Company's proposal are groundless." It points to no record evidence to support the implication in its argument that the Guild was told that the relationship between evaluations and merit pay and its operation would be identical to past practice.

Again, the News argues that the Guild never asked such questions as to whether employees rated acceptable might not get a raise nor, it claims, did it ever ask who would receive an increase. It argues that the Guild was seeking a formula where one does not exist. As already discussed above, the Guild was not simply asking for a rigid formula. Certain factors were asked about and other factors were implied, if not expressed, in its informational request. There is no excuse for the News' failure to disclose relevant determinant factors and other information it had in hand by July 10, simply on the ground that the

Guild sought only a formula disclosure. The News did not, as it now argues, have to "guess" what the Guild wanted to know. Such information was reasonably implied, e.g., that competitive pressures "inference a raise." That is what they wanted to know, i.e., influencing factors, and, moreover, it asked a variety of questions about the proposal and not merely asked for a formula. The News, in effect, argues that the Guild somehow should have divined specific factors in the News' thought process and their formulated precise questions.

I conclude that the News breached its good-faith bargaining obligations before and after July 5 by continuing to refuse to disclose requested information about the merit pay proposal necessary and relevant to the Guild's representational and bargaining obligations.

(2) Proposal 7—information requests

The Guild's pre-July 5 request for a listing of all unit employees whom the News considered to qualify for exemption under the FLSA was reiterated on July 10 and 11 and in August. This time it was phrased to avoid the evasion that the News did not know who would apply. The Guild was not asking who the News thought would apply but who it considered to be qualified, given present duties. By July 10 and 11, the significance of this information had been stressed by the Guild, i.e., it was not employee identity per se that was crucial, but it was the scope and impact of the proposal. Yes, Ice conceded that he thought few would apply but, in bargaining notes, Jaske's sardonic reply suggests that the news expected a greater number would apply. The question was, however, how many unit employees the News considered would be qualified. The identities provide a basis for argument and negotiations as to possible criteria. Neither was the Guild demanding that the News commit itself to a definitive conclusion on qualification. Again, it merely was seeking to ascertain the News' own expectation of the potential scope of its proposal and impact. The News ultimately justified its refusal on the grounds that the response called for a "pointless exercise" of burdensome proportion. There was no evidence as to how burdensome the effort would have been. Clearly, if the parties had come to some understanding or expectation that a minimal number of employees would ultimately qualify under the News' ultimate determination, the Guild may very well have moderated its position. The Guild, as it argues, needed information to place proposal 7 in perspective. It is difficult to believe that the News entered negotiations without having formulated its own expectation of the scope and impact of its proposal, including cost factor analysis, as it had done for its merit pay proposal. Not only did the News refuse to compile the listing except for Taylor's meaningless classification listing letter, the News proffered no other information to satisfy the Guild's request to ascertain the News' scope and impact expectation. Under these factual circumstances, the News was obliged to comply with the request.

4. Conclusion

Upon the foregoing factual findings and analysis, I find that the Respondent News violated Sections 8(a)(5) and (1) of the Act with respect to the unilateral implementation of its proposals regarding merit pay and television assignment on July 5, 1995, and its refusal to furnish the Guild with requested information on April 25, July 10, 11, and August 4, 1995, as alleged in the complaint and as found above.

⁵⁰ The News does not claim, nor could it validly claim, that impasse was reached with respect to proposal 8 merely because it had given the Guild sufficient notice and opportunity to bargain about it which the Guild had ignored in the absence of overall impasse on the contract. *RBE Electronics*, 320 NLRB 80, 81 (1995), citing and discussing *Bottom Line Enterprises*, 302 NLRB 373 (1991).

F. Cases 7–CA–37427 and 7–CA–37606—Removal of Guild Bulletin Board and Mailbox Material by the News (Complaint par. 37 through 41)

1. The issues

The editorial department of the News is located on the second floor of the Detroit News Building. There is a 4-foot-wide open air bulletin board, for many years reserved for the exclusive use by the Guild in an area near "writers row." Approximately 10 feet from the bulletin board is a bank of mail slots for editorial employees.

Christina Bradford has been the News' managing editor for 8 years. She is responsible for the daily operations of the newspaper and reports directly to publisher Robert Giles. Around midnight, but a few hours before the July 13 strike commenced, she removed from employee mail slots located on the second floor of the News building copies of union flyers which Guild bargaining team member Bob Ourlian, a News employee, had just inserted. The mail slots had been used for years by the Guild, employees and management for interoffice and intraoffice communications.

About the same time, Bradford approached two bulletin boards reserved exclusively for the Guild's use. At each, she removed all of the posted literature. Employee Phillip Lloyd observed her at the third floor bulletin board. He saw her "viciously" pulling down papers by the handful without even bothering to remove the pins and tacks. She left the board bare. Lloyd reported the incident to six other employees.

Bradford removed 124 documents. Among them were strike notices, Guild bargaining updates, articles concerning other DNA Unions, a Guild unfair labor practice charge against the News, a formal complaint against the News and notice of hearing in NLRB Case 7–CA–36657 (the "Channel 50" case), a job opening notice, a cartoon and a thank-you note addressed to the staff from a former News employee.

The Guild's right to communicate via the bulletin boards in question has long been codified in the parties' contract. The practice with respect to the Guild's use of the office mail slots is similarly undisputed.

Bradford testified that she removed the literature from the mail slots and bulletin boards because she was angry that the Council Unions had set a strike deadline which she felt "jumped the gun" because negotiations were still ongoing.

Bradford has never been disciplined for her conduct. No one in the News' management has ever informed her that she lacked a legal right to engage in that conduct. She has never apologized to the Guild for her actions nor disavowed her actions in any way.

On the following day, July 13, Bradford had an opportunity to pass by the bulletin board and the mail slots and she noticed that copies of the notices she had removed the night before were back up on the bulletin boards and in the mail slots.

In the past, neither Bradford nor other editors of the News have removed materials from the union bulletin boards or employee mail slots.

2. Analysis

Bradford's conduct is alleged to constitute a change in conditions of employment which is a mandatory subject of bargaining for which the Guild was not given opportunity to bargain in violation of Section 8(a)(5) and (1) of the Act.

I agree with the News that Bradford appeared to have acted impulsively "in a fit of pique" as she removed everything from the bulletin board and mail slots without regard to content.

The News recognizes that the removal of literature from a bulletin Board reserved for or allowed for use by the Union may constitute violation of Section 8(a)(1) of the Act and cites: *J.C. Penney, Inc.*, 322 NLRB 238 (1996) (supervisor removed union materials while nonunion materials were allowed to be posted); *Kenmore Mercy Hospital*, 319 NLRB 345, 346–347 (1995) (employer allowed antiunion material to be posted, but not prounion material); *Fairfax Hospital*, 310 NLRB 299, 303–304 (1993), enfd. 14 F.3d 594 (4th Cir. 1993), cert. denied 129 L. Ed 809 (1994) (hospital permitting posting of personal items while not permitting and removing only union-related materials).

The premise is that although employees have no statutory right to use an employer's bulletin board, once permission is granted, it must not be accorded selectively or disparately. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983). Similarly, where an incumbent union maintains an agreement with an employer regarding a bulletin board which is incorporated in an ongoing collective-bargaining agreement, that right may not be abridged by censorship as to what the employer considers "reasonable and proper notices." *Monongahela Power Co.*, 314 NLRB 65, 69 (1994). Such conduct violates Section 8(a)(1) of the Act. Id.

Respondent argues that Bradford's conduct constitutes at most a one-time emotionally spontaneous occurrence and not a unilateral change in the terms and conditions of employment as found by the Board in cases it cites as *R.P.C., Inc.*, 311 NLRB 232, 241 (1993); *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991); *Severance Tool Industries*, 301 NLRB 1166, 1170–1171 (1991), enfd. 953 F.2d 1384 (6th Cir. 1992).

The General Counsel merely argues that the complaint allegation is meritorious based upon admitted conduct. The Guild cites Container Corp. of America, 244 NLRB 318, 321 (1979). That case involved no 8(a)(5) allegations. However, the Guild, anticipating the News' alternative de minimis argument, cites Rangaire Acquisition, 309 NLRB 1043 (1992), in which it alleges the Board reversed the judge's finding "that a single denial of a fifteen minute extended lunch period violated the Act." An 8(a)(5) violation was found. However, it was a past practice that the employer therein unilaterally ended. The remedial Order included a reinstatement of that past practice. The other case cited by the Guild, which held that a single threat to discharge an employee because she intended to strike, is not de minimis. Sunnyside Home Care Project, 308 NLRB 346 (1992). The violation was of Section 8(a)(1).

I agree with Respondent News' characterization of Bradford's impulsive, angered conduct and find that no rescission of a past practice had occurred and no violation of 8(a)(5) occurred and that no remedial status quo ante is required.

However, I do not agree that her conduct, though impulsive in nature, was de minimis. Bradford is no line-level supervisor. She is a high profile, upper echelon manager. Her conduct was not likely to go unnoticed, nor to have been considered without significance to the unit employees who observed her. I agree that a violation of Section 8(a)(1) of the Act occurred which requires a remedial Order.

G. Strike Causation

1. The issue

Complaint paragraph 43 alleges that the July 13 strike was caused and prolonged by the foregoing unfair labor practices. It is conceded that the General Counsel has the burden of proving that the strike was at least in part caused or prolonged by Respondents' unfair labor practices. The Respondents argue that the strike was for all practical purposes motivated by a multitude of divisive, unresolved economic issues which dwarfed the significance of any meaningful unfair labor practice causal relationship. Respondents argue that the evidence submitted by the General Counsel must be evaluated as "self serving rhetoric of sophisticated union officials and members inconsistent with the true factual context," citing Soule Glass Co. v. NLRB, 652 F.2d 1055, 1080 (1st Cir. 1980), as quoted by the Board in C-Line Express, 292 NLRB 638 (1989). With respect to the credibility of General Counsel witnesses, because they are uncontroverted, not internally inconsistent and generally of convincing demeanor, I am unable to discredit them because some of them may have been less than immediately responsive when questioned as to the references to unfair labor practices in their internal communications. It is understandable that economic issues may have preoccupied their concerns and recollections, but that does not necessarily raise the inference that unfair labor practices were simply a contrived "afterthought" as Respondent argues.

2. Facts

It is clear from unrefuted record evidence that as of the outset of the strike, numerous issues deeply divided each of the six Unions and the Respondents. Some of these issues included staffing (Mailers Union); manning (Local 13N); two-tiered wage system and subcontracting (Guild, maintenance); jurisdiction (Local 18 DTU); carrier vs. agent system, district managers, warehouse staffing, district manager compensation, pension and single copy commissions (the 1100 member Local 372).

It is true, as Respondents argue, that the Council and its constituent Unions issued written statements to their members and to the public referring solely to the nonunfair labor practice issues and strike authorizations were obtained for the International Unions before the dates of unfair labor practices.

However, from the inception of bargaining, the Council of Unions had made the two-level point bargaining format a high priority. The member Unions reaffirmed their joint commitment to that objective. Concurrently, each Union pledged commitment to support one and another on all issues. Upon the DNA's initial agreement to the two-level bargaining format, the Council publicized it to its members as a great concession by the DNA and a great victory for Council solidarity. Their members wore buttons proclaiming "We are all together," "Metropolitan Council of Newspaper Unions."

Derey's letter to Vega on June 17, protesting the abrogation of the agreed-upon format, warned of an unfair labor practice charge filing and characterized DNA's conduct to be serious enough to support an unfair labor practice strike. Thereafter, at Council of Union meetings, the DNA's bargaining format abrogation was described and discussed and severely denigrated by various member officers. The unfair labor practice charge was filed on June 27.

In anticipation of the expiration of the contract and through negotiations, the individual Unions held membership meetings. Recommendations were made to the members to support the Council. Reports of negotiations were given the members. On June 25, at GCIU Local 13N meetings, Howe reported to the members the joint bargaining reneging by the DNA and the Guild merit pay issue (and DTU Local 18 impasse). At a July 12 meeting, Howe discussed a strike possibility and urged Council solidarity.

Teamsters Local 372 had obtained from the membership its strike authorization. On July 6, Derey reported to the members the strike deadline and described the issues in which he included joint bargaining reneging by the DNA and the Guild unit merit pay implementation (and DTU Local 18 alleged impasse). He told the members that the strike would be an unfair labor practice strike.

DTU Local 18 President Attard met with the members a few days before the strike and told him that the DNA had reneged on joint bargaining, described also the jurisdictional issue and accused the DNA of bargaining in bad faith.

Subsequent to preliminary April strike authorization, GCIU Local 289 President Ogden instructed the shop chairman to conduct a final step strike action vote among the members because of the DNA joint bargaining reneging, the News merit pay implementation and DTU Local 18 jurisdiction "problems." This conduct was related to the members by the shop chairman who characterized it to them as unfair labor practices prior to their final strike vote.

The Guild conducted a membership meeting on April 30. Kummer discussed, inter alia, at length the News' merit pay and overtime exemption proposals. He told them that the five other union members had voted for strike authorization. A vote was taken which authorized the local officers to call a strike if necessary. Subsequently, the Guild's parent International Union granted strike sanction empowerment to the local officers.

On July 6, the Council held a meeting of the chief officers of the five Unions: Derey, Howe, Kummer, and Rudy Cummings. Derey complained about what he characterized as the DNA's regressive bargaining with Local 372 and they all discussed the two-level joint bargaining abrogation by the DNA. Attard reported the claim of impasse by the DNA. Howe reported that he had received a complete contract offer from Jaske inclusive of a "me too" provision, which Howe proceeded to characterize as proof that the DNA intended to "split the Council, split the unity." Young expressed concern about that offer and urged solidarity. Kummer reported that the News had implemented the merit pay proposal, which he characterized as unacceptable, but that the News would not bargain about it. Other contract issues were discussed as well. They all agreed to set a strike deadline for July 13.

Shortly afterward, but before the strike, local meetings were conducted between the officers of Local 372, various Guild units, GCIU Local 13N and DTU Local 18. Derey reported the joint bargaining, merit pay and the DTU jurisdictional issues' status and the strike deadline. Most of the discussion, however, related to other issues.

Mleczko, who had conducted meetings of various Guild units during the 3 weeks prior to the strike, reported to the members the status of bargaining, of which there was expressed by members an overriding interest in the merit pay issue and the overtime exemption proposal. There was also concerned membership discussion about the health benefit and life insurance proposals and the lack of joint bargaining. The members inquired about whether the Teamsters would support the Council in the event of a strike. At one meeting, the DTU Local 18

shared jurisdiction issue was discussed. Toward the strike deadline, Kummer warned the members to prepare for a strike because of the breakdown of the joint bargaining agreement with the Council which he told them was compounded by the implementation of merit pay by the News.

Howe reported to his members the collapse of the joint bargaining agreement and his impression that the DNA was not interested in reaching contract agreements. He reported that other Council members were having problems with the DNA but that they would remain united if there was to be a strike. He did not specify those "problems."

On the Sunday before the strike, a joint membership meeting of DTU Local 18 and GCIU Local 289 was conducted by Ogden, Attard, and two International Union representatives. There was discussion of what was identified as the cause of the lack of bargaining progress, i.e., lack of compliance with the arbitrator's award.

On July 12, the Unions met and discussed a proposed document that had been drafted by Attorney McKnight. The Unions agreed that there was a need to make "a very public commitment to one another" to stand unified and to set forth the reasons they intended to strike. The Unions discussed the unfair labor practices that had been filed regarding joint bargaining and others which were to be filed in the future, including charges with respect to Guild merit pay and DTU Local 18 implementation. On July 12, the principal officers of the six Council Unions signed the following resolution:

Whereas the DNA/Detroit Newspapers (including the News and Free Press) has engaged in anti-union conduct, negotiated in bad faith and reneged on its promise to bargain jointly on economics, the undersigned Unions hereby resolve their members employed at the DNA/Detroit Newspapers each will strike and honor each other's strike in protest of the DNA/Detroit Newspapers (including the News and Free Press) anti-union conduct and unfair labor practices.

The Guild, as the sole Union whose members were employees of the Detroit News and Free Press, signed an additional resolution which provided:

Whereas DNA/Detroit Newspapers, The Detroit News and Detroit Free Press have engaged in anti-union conduct, negotiated in bad faith and committed various unfair labor practices, the Newspaper Guild of Detroit Local 22 hereby resolves that its News and Free Press members will strike in protest of their employer's unfair and illegal conduct and will honor and support the strikes of their brothers and sisters in other unions.

Ogden testified that the unfair labor practices referred to by the resolutions were the bargaining unit issue with respect to DTU Local 18, the merit pay issue with respect to the Guild and the repudiation of the joint bargaining agreement which the officers of the six Unions had previously discussed among themselves.

When the strike commenced on July 13 at 8 p.m., virtually every picket sign except for an isolated exception had either "ULP" or "unfair labor practice" printed or handwritten on it. Derey also testified that a document entitled "Picketing Do's and Don'ts" and another document entitled handbilling "Do's and Don'ts" were passed out to the picket captains and handbilling captains, respectively, a couple of days after the strike. Mleczko, Young, and Howe testified in a similarly fashion. Among the Do's were:

DO explain the reason we are on strike is because the Detroit Newspapers engaged in greedy, anti-union conduct and bad faith bargaining and forced us out on strike.

. . .

DO explain the reason why you are handbilling—We believe that employees at the Detroit Newspapers were forced out on an unfair labor practice strike because the Company wants to bust our Unions. We are boycotting advertisers who continue to support the Newspapers with their advertising dollars.

Respondent argues that the Union's public statements to their membership and to the media "uniformly referred to the individual economic issues that separated the parties at the bargaining table as the cause of the strike." However, one document cited, entitled "The Alliance," dated July 11 and published by the Council, while referring to nonunfair labor practice issues, does refer to the unilateral imposition of merit pay by the News (and also the shared jurisdiction issue between the DNA and DTU Local 18). Another cited document, a Local 372 newsletter to members similarly includes among a multitude of issues a DNA "refusal to bargain" which arguably could be encompassed within the refusal to bargain in the agreed-upon, two-level bargaining process. ⁵¹

The unrefuted record evidence reveals that although the Union frequently did refer to numerous other issues as strike motivations, they did publicly on other occasions refer to one or more of the alleged unfair labor practices or to unfair labor practices generically in literature propagated to members, customers and the public, in addition to the do's and don'ts distributed to members. One entitled "Urgent Update Newspaper Bargaining," prepared before the strike, stated "management has reneged on its commitment to bargain jointly with all six Locals over economic issues."

Numerous communications were prepared by the Unions which referred to the strike as an unfair labor practice strike, duplicated in the hundreds and thousands. Letters given to union members for distribution and mailed to stores selling Respondents' newspapers petitioned such stores to cease the sale of the papers and described the strike as being caused by "numerous unfair labor practices." A letter prepared for Mailers Local 2040 members to use in financial hardship situations described the members as being on strike because of "unfair labor practices."

Other writings prepared for distribution to union members and the general public described the events which preceded and caused the July 13 strike. In early September, 20,000 copies of "The Detroit Union" were published containing an article "Why We Strike" which described DNA's repudiation of its joint bargaining agreement that "shattered the bargaining process." The article described each of the Unions and their specific problems, including unilateral imposition of merit pay at the Detroit News, the DNA's "elimination of critical work protections contained in ongoing agreements" and future elimination of the bargaining unit with respect to DTU Local 18.

⁵¹ Respondent argues that if there had been any unfair labor practice by such conduct, it was cured by Jaske's July 7 offer to bargain individually and then jointly. However, the factual findings above-disclosed subsequent conduct by Jaske which was inconsistent with the agreement.

3. Analysis

The facts disclose, and it is not disputed, that the six Council Unions were engaged in either a primary strike or sympathy strike. Therefore, if the Respondents committed any unfair labor practice that was causally related to any strike, it became both a primary and sympathy unfair labor practice strike, both of which are protected activities. *Whayne Supply Co.*, 314 NLRB 393, 400 (1994), and cases cited and discussed therein.

Certain unfair labor practices have been found by the Board, with Court approval, to have an inherent causal effect without other evidence of explicit motivation of strikers or strike decision-makers. F. L. Thorpe & Co., 315 NLRB 147, 149 (1994), enfd. in part 71 F.3d 282 (8th Cir. 1995); C-Line Express, 292 NLRB 638 (1989); SKS Die Casting & Machinery, Inc. v. NLRB, 941 F.2d 984, 991 (9th Cir. 1991); Vulcan Hart Corp. (St. Louis Div.) v. NLRB, 718 F.2d 269, 276 (8th Cir. 1983). Furthermore, the Board and reviewing Court may consider objective criteria and evaluate "the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context." Soule Glass Co., supra, 652 F.2d at 1080. See also Gibson Greetings, Inc., 310 NLRB 1286, 1288 (1993), where the Board relied upon objective evidence and concluded that a strike had been prolonged by the employer's conduct "which tainted the bargaining climate and impeded opportunities for settlement of the strike."

As found above, the News' unilateral implementation of its discretionary merit pay proposal violated the Act under the *McClatchy II* rationale by engaging in conduct that was "inherently destructive of the statutory collective bargaining process," and which, unremedied, impeded the Guild's ability to bargain meaningfully. Clearly, under that view, the News' conduct prevented further bargaining and inherently caused the ensuing strike by the Guild which became an unfair labor practice strike and which caused the strike by the other units to be sympathy unfair labor practice strikes.

Additionally, I find that the News' refusal to comply with the information requests of the Unions necessary for bargaining and the DNA's reneging upon the agreed-upon format of the bargaining process constituted sufficient objective evidence upon which to conclude that the Respondents tainted the bargaining climate, impeded settlement and had the probable impact of motivating the unit members to strike.

However, even if the objective evidence is insufficient, the General Counsel has adduced ample subjective evidence to sustain his burden of proof.

In *C-Line Express*, supra at 638, the Board stated, with respect to the causal relationship of a subsequent unfair labor practice to the prolongation of a strike:

The Board has long held that an employer's unfair labor practices during an economic strike do not ipso facto convert it into an unfair labor practice strike. Rather, the General Counsel must establish that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage.

Elsewhere, the Board has held causation or prolongation where the unfair labor practice was a contributing cause, a cause in part, or played a part in a contributing factor or where it had anything to do with causing a strike. See, respectively: *Walnut Creek Honda*, 316 NLRB 139, 142 (1995); *Capitol Steel & Iron Co.*, 317 NLRB 809, 813 (1995), enfd. 89 F.3d 692 (10th Cir. 1996); *Fairhaven Properties, Inc.*, 314 NLRB 763, 768

(1994); Domsey Trading Corp., 310 NLRB 777, 791 (1993); Decker Coal Co., 301 NLRB 729, 746 (1991); NLRB v. Moore Business Forms, Inc., 574 F.2d 835, 840 (5th Cir. 1978). Thus the criteria is not whether a strike would have occurred anyway in the absence of unfair labor practices nor even the extent of their prominence in the causal motivation.

The General Counsel has adduced abundant evidence, in the form of internal union discussions, internal and public union communications, and picket signs, upon which to conclude that the prestrike unfair labor practices of the News and DNA in some part impacted or tended to impact the subjective motivation of the strikers.

I therefore conclude that the strike on July 13 commenced and continued thereafter as an unfair labor practice strike and/or unfair labor practice sympathy strikes.

H. Threats of Permanent Replacement (Complaint Pars. 44, 45, and 46)

1. Facts

The facts are not in dispute. On July 26, Giles wrote to the News' striking editorial unit employees warning them that a decision to hire replacements for them was being accelerated by the Union's bargaining position. He advised them that some of their coworkers have abandoned the strike and assured them that if they returned, the Guild could not lawfully seek retribution, but Giles further stated that a decision "to resign from union membership is purely a personal choice" He then stated:

If The News hires replacement workers and if you are permanently replaced, you are not discharged. If and when you make an unconditional offer to return to work, you may return to your old position, if it is vacant. If a permanent replacement occupies your old position, we have no obligation to terminate the replacement if you wish to return. In that instance, you will be placed on a preferential hiring list and, as vacancies occur, you will be recalled for those positions for which you are qualified.

On July 27, in a letter signed by several of its managerial agents, the Free Press, wrote to its striking editorial unit employees setting forth a series of questions and answers, one set of which related to the consequences of a decision to hire their replacements if such decision is made. A similar statement was set forth in Giles' above letter but with somewhat more assurance of nondischarge status. On August 7, a similar letter was sent by the Free Press in which the strikers were warned that if they did not return to work by August 10: "we intend to exercise our legal rights to have permanent replacements."

Reference was again made to a preferential rehire list as the strikers' only access to future employment. The August 9 edition of the Free Press included publication of the August 7 letter in its entirety. A similar article referring to the permanent replacement hiring appeared in the August 10 edition.

On August 18, another Free Press question-and-answer letter was sent to the editorial unit strikers wherein they were warned once more about their preferential only reinstatement status; that they would receive no advance notice with respect to being permanently replaced; and that the longer they struck, the "more risk there is that his or her position will have been filled." Meanwhile, new hires at the Free Press received letters stating:

For purposes of Federal law, we consider you a permanent employee If the Free Press were required by law to return striking workers to our workforce, you would not be terminated for that reason. You would remain on the Free Press staff

In October press releases and October and November editions of the News and Free Press, DNA spokesperson Vega was quoted as making similar striker replacement statements as well as expressing an intent not to displace the replacements who were characterized therein as more productive workers than the strikers and who would remain employed "as long as they want."

Free Press negotiator Kelleher, in response to a question by Guild attorney Ice in negotiations on November 30, stated in the presence of several employee negotiators that in the event of Guild settlement, any Free Press employee who engaged in a sympathy strike would be permanently replaced. In a negotiating meeting on February 12, 1996, between the DNA and GCIU Local 13N, in the presence of several striking pressmen, Jaske rejected Ice's proposal that returning strikers displace, if necessary, their replacements.

2. Analysis

Respondents rely upon their position that the strike was not an unfair labor practice strike. The Board and Court precedent are clear and apparently puts a struck employer at risk in telling striking employees that they may be permanently replaced and put on a preferential rehire status only.

Unfair labor practice strikers are entitled to reinstatement even though the employer has hired permanent replacements. The replacements must be terminated if necessary to make room for the unfair labor practice strikers. Walnut Creek Honda, 316 NLRB 139, 142 (1995); NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 fn. 5 (1967); Mastro Plastics v. NLRB, 350 U.S. 270 (1956). It is equally well established that an employer may not warn unfair labor practice strikers that they will be permanently replaced. Decker Coal Co., 301 NLRB 729, 748 (1991); Escada USA, 304 NLRB 845, 850 (1991), enfd. mem. 140 LRRM 2872 (3d Cir. 1992); Walnut Creek Honda, id.

By the foregoing statements to the striking employees either directly, in press releases, in news article interviews, and at the bargaining table, Respondents Free Press, News and DNA have violated Section 8(a)(1) of the Act.

The complaint alleges further that such conduct has also prolonged the strike. The General Counsel has adduced no subjective evidence on the issue and does not address it in the brief. Presumably, the General Counsel's position is that such conduct either inherently prolongs a strike or is of such a nature in the context of the facts in this case which would reasonably tend to induce strikers to continue to strike. I conclude that subjective evidence is not required. Such warnings of replacement would have alternative effects, i.e., either frightening some strikers into quitting the strike or infuriating and embittering other strikers who refused the inducement. I find both an inherent tendency to prolong the strike and in the context of the press releases, news articles and negotiating context, strikers reasonably would tend to continue striking in protest of the original unfair labor practices which now take on an even greater significance.

I see little causal relation difference between warning to permanently replace strikers and that of one coupled with an

implied threat to terminate the employment of a striker which has been held to be conduct likely to prolong a strike. *Walnut Creek Honda*, supra, 142.

Accordingly, I find that by such conduct, Respondent prolonged the strike.

I. Replacement Employee Information Request Case 7–CA–38422

1. The issue

The complaint was amended at trial to allege that on or about September 11, 1995, September 19, 1995, October 17, 1995, and January 18, 1996, the Charging Unions, in writing, requested from the Respondent's relevant and necessary information which was refused from about September 11, 1995, until April 5, 1996, in violation of Section 8(a)(5) of the Act.

2. Facts

On September 11, Attorney Sam McKnight, by letter, requested on behalf of the Unions certain information concerning "all non-temporary employees and/or replacement employees and/or newly hired employees for the period July 13, 1995 and continuing to date." He requested documents which disclosed, inter alia, the name, address, date of hire, and wages and benefits received by such persons.

In addition to the documents relating to identification of employees and their terms and conditions of employment, he asked for:

Any documents or tangible things, including correspondence, memoranda, agreements, contracts, notices, applications, acknowledgments, bulletins and statements, which in any respect memorialize the employment relationship (including any changes in the employment relationship) between each employee and the Detroit Newspapers (including the Detroit News and/or Detroit Free Press).

The letter stated that it was an ongoing request for information and that the information sought was critical to a resolution of the dispute between the parties.

Only the testimony of one Respondent witness was adduced on this issue, i.e., John Taylor, senior legal counsel and director of labor relations for the DNA. According to him, the following Respondent reaction occurred to McKnight's letter request. Taylor met with Kelleher within 3 or 4 days to review what information they would furnish the Unions. Taylor had a copy of McKnight's letter when meeting with Kelleher. With regard to the request for documents disclosing each permanent replacement's name, address, date of hire, and employment application, the two agreed the request was appropriate and that they would furnish the information. The two also agreed to furnish the personnel action request forms (PARs) for all replacement employees. The forms document any personnel changes and it was believed that they would provide the information requested in subparagraphs 1 through 4 of McKnight's request. The two also agreed to provide all employment letters if there were any such letters of which they were aware. With regard to documents that disclose benefits provided permanent replacements, the two were aware there were information packets that the human resources department provided to all new hires, and so Taylor and Kelleher agreed to provide the packet to the Unions and to withhold no information. Taylor and Kelleher agreed that the PARs would also address the information requested in subparagraphs 6 through 8 of McKnight's request.

Shortly after meeting with Kelleher, Taylor met with Bob Casper, the human resources information systems and compensation manager, and one of Casper's clerks who would gather the requested information, and discussed how the information should be provided. In reviewing the request for information, Casper stated that in response to subparagraph 3, there were what he characterized as strike replacement letters signed by the employees. Taylor agreed they should be finished and he so instructed the personnel clerk. The clerk and two assistants then began examining each personnel file and copying the requested information.

When there was no immediate response to the request for information, McKnight reiterated his request on September 19, 1995, and filed an unfair labor practice charge on September 22, 1995. On September 22, 1995, Taylor informed McKnight by letter that the DNA was compiling the requested information and would begin furnishing it to the Unions shortly. On September 29, Taylor personally delivered the first installment of the requested information to McKnight's office. A cover letter with the documents listed three categories of information regarding DNA striker replacements: (1) employment applications and fact sheets for newly hired employees whose last names begin with letters A through G, (2) employment applications and personnel action reports (PARs) for newly hired employees who had been terminated, and (3) a benefits orientation package which described benefits made available to newly hired employees. There were no copies of replacement employee letters nor any reference therein to them in the covering letter. Taylor gave no explanation for the omission despite having at least generally reviewed the material before its submission to McKnight and despite his alleged conversation with Casper. Taylor did not attempt to explain why, in all subsequent letters to and conversations with McKnight regarding the ongoing informational request, he made no reference to the unsupplied replacement letters described to him by Casper.

McKnight invited Taylor into a conference room and began to review the material. McKnight asked if all the employees were permanent replacements and Taylor stated they were. McKnight asked when the balance of the information would be available. Taylor testified that he hoped to have it in the next week or two. McKnight testified that Taylor promised that it would be available early next week. Taylor did not recall that anything further was said. However, McKnight testified that after Taylor had responded that all replacements were permanent, he asked Taylor whether or not the permanent replacement employees had signed "a contract or an agreement of some kind indicating their employment status or whether there were letters or statements of some kind that indicated their permanent status with the paper." According to McKnight, Taylor responded, "no, this is everything," but he persisted "didn't you have the employees sign something or isn't there some kind of document or letter or statement which describes their permanent status[?]" Taylor again reassured, "No, this is

everything." Taylor testified that he at no time ever denied the existence of letters signed by replacement employees. He did not deny that McKnight had made the inquiry. Based on Taylor's representations that Respondents would provide the remainder of the requested information, McKnight withdrew the unfair labor practice charge he had previously filed over Respondent's failure to produce information.

On October 9, Taylor furnished to McKnight the requested information for DNA employees with last names commencing with the letters H through V. He then delivered the requested information on DNA employees with last names beginning with W through Z and for all News editorial employees on October 20, 1995.

McKnight asked Taylor for Free Press editorial employee information which was supplied on October 30, 1995, following the filing of yet another unfair labor practice charge which was subsequently dismissed.

On January 18, McKnight wrote to Taylor reiterating his September 11 request and characterizing it as ongoing. By letter of January 24, Taylor promised to comply. After some telephone discussions between Taylor and McKnight as to the mode of compliance, on about February 10, Taylor began furnishing monthly computer printout reports to the Unions, setting forth each permanent replacement employee's name, address, social security number, date of hire, adjusted hire date if applicable, title, status (full- or part-time), rate of pay, race, sex, and date of termination if applicable.

The only explanation Taylor proffered in his testimony for the failure to produce the replacement letters, which he claimed he, Kelleher, and Casper understood should be produced to the Unions, was inadvertent clerical error. Simultaneously, he testified that he understood he was responsible for that failure. His explanation is not satisfactory because even crediting his cryptic version of the September 29 conversation with McKnight, there is no explanation as to why he did not realize the error then or at subsequent information submissions, or at least verbally volunteer to McKnight the information of the existence of the letters described by Casper, having conceded his understanding that the material was considered important to the Unions.

On March 22, a position statement was submitted by Respondents to the Michigan Employment Security Commission (MESC) which stated a position that striking employees were not eligible for unemployment compensation under the "labor dispute disqualification" of the unemployment law. Respondent's letter to the MESC purports to respond to the MESC's request for information concerning striking employees "who have been 'permanently replaced." Respondents' response was that the request "calls for a legal conclusion which cannot be made at this time," despite Taylor's verbal characterization of the replacements as permanent on September 29.

In arguing that "no final determination has been made as to whether permanent replacements have been hired," Respondents' position statement stated "each replacement has signed a statement providing that he or she is considered a 'permanent replacement for a striking employee' but that '[i]n the event the union comes back, [he or she] will not be terminated unless we are required by law or contract to do so" '[emphasis omitted]. Respondents attached a sample document stating, "Exhibit D is a statement signed by replacements hired by Detroit Newspapers. Similar letters were signed by replacements hired by the Detroit News and Detroit Free Press."

⁵² When asked in cross-examination if he first reviewed the documents before delivering them to McKnight, he answered "yes." Then he equivocated, adding "Yes, in a manner of speaking, yes." Then he said he did not review each document. However, by the omission of any reference to these replacement letters in his covering letter, he clearly must have been aware of their nonproduction.

McKnight received a copy of Respondents' MESC position statement from the attorney representing the Unions with respect to MESC matters in late March or early April 1996. Prior to his receipt of that position statement, McKnight had never seen such a document, nor had any such document been provided to him by any Respondent in response to his requests for information, nor had he been provided any document which purported to describe the status of replacement employees as permanent.

On February 19, 1996, McKnight subpoenaed certain information from the DNA, the News and the Free Press. In response to a subpoena that had been issued to the Free Press, McKnight received a sample of a letter the Free Press had sent to new hires which differed in significant detail from the DNA and News letters.

Additionally, in response to his subpoena, McKnight received about 50 letter statements identical to Exhibit "D," that had been filed with the Michigan Employment Security Commission and were signed by replacement employees in the News editorial department.

On April 16, 1996, McKnight wrote the News, the Free Press and the DNA that he had filed an unfair labor practice charge against them as a result of such statements not being furnished. Taylor testified that he recognized that the failure to furnish the signed statements was an oversight by the personnel clerk who gathered the information, and he subsequently wrote to McKnight, enclosing copies of the form letters signed by replacements at the News, the DNA, and the Free Press and offered to stipulated that all replacements signed such letters. Taylor wanted to avoid the task of searching through the 1500 personnel files on replacement employees to extract and copy the statements. McKnight rejected Taylor's offer. Respondent subsequently promised to furnish copies of all such letters. However, as of the time of the instant trial, Respondents had not as yet fully complied.

3. Analysis

The General Counsel correctly argues, and Respondents do not dispute, that the requested information's disclosure and production was obligatory and appropriately cites *Page Litho*, 311 NLRB 881, 882 (1993), enfd. in part, enf. denied in part 65 F.3d 169 (6th Cir. 1995).

The Respondent does not contend that it could evade its responsibility to satisfy a timely request for the data by merely stating to the Unions the legal conclusion that the strikers were permanently replaced nor could they justifiably do so. The Union's right to information is evaluated by the standards applicable to discovery. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); and they are entitled to the requested information "to judge for themselves" the status of the strikers. Compare *Associated General Contractors of California*, 242 NLRB 891 (1979), enfd. 633 F.2d 766 (9th Cir. 1980). I find that it is particularly appropriate in this case that the Unions have the striker replacement letter agreement's exact verbiage and evidence of exactly who signed them in order to make their own evaluation, especially where the Respondents' statements to the MESC subsequently tended to cloud the issue.

Respondent premises its defense in terms of Section 10(b) of the Act, timeliness issue, i.e., the charge was filed on April 17, 1996, more than 6 months after the September 29 furnishing of documents. Respondent states in its brief: While Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board," the Board has carved out an exception to the 10(b) period where there has been fraudulent concealment. *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enfd (mem.), 785 F.2d 304 (4th Cir. 1986). In *Brown & Sharpe Manufacturing Company*, 312 NLRB 444 (1993), vacated and remanded on other grds. sub nom., *Intern. Ass'n of Mach., Dist. Lodge 64 v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995), the Board stated that it applies the equitable doctrine set forth in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). As the Board explained in *Brown & Sharpe*:

Under that doctrine, if a party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . .""

Brown & Sharpe, 312 NLRB at 444. The Board set forth "three critical requirements" to establishing fraudulent concealment:

(1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part.

Id. Even assuming that the Newspapers neglected to furnish the letters signed by the replacements, there is *no* basis for saying that the Newspapers fraudulently concealed the information.

Respondents contend that Taylor must be credited wherever his testimony conflicts with McKnight. Essentially, Respondents argue that it just would not have made any sense for Taylor to have deliberately concealed the strike replacement letters because of the full disclosure he ultimately made of other striker replacement information, and his initial statement to McKnight that the strikers were permanently replaced, and that mere oversight is a more plausible explanation. Yet, if it were so conclusively settled that the strikers were permanently replaced, what is the explanation for Respondent's statement of position to the MESC?

As noted above, even without McKnight's testimony, Taylor's conduct is inexplicable. Furthermore, coupled with his lack of corroboration by Casper, the clerical employees, and even Kelleher, his own testimonial internal inconsistency and his poor, unconvincing testimonial demeanor, I cannot believe his testimony, even if uncontradicted, that until April 1996, he had not been aware that the striker replacement letters had not been supplied to the Unions. ⁵³

The only explanation for the nondisclosure other than deliberate intent would be grossly negligent irresponsibility, highly unlikely in a professional of Taylor's experience and stature. But even if gross negligence was the reason for the nondisclosure, I would find it so serious as to be tantamount to deliberate concealment, and thus all three of the *Brown & Sharpe* criteria present in this case.

In the final analysis, I must credit McKnight's testimony that Taylor deliberately concealed the requested data by denying its existence for whatever motives or reasons he or other

⁵³ As to demeanor, Taylor was variously assertive, hesitant, aggressive, guarded, casual, but yet tense to the point of very rapid, clipped speech and tapping feet, depending upon the nature of the questions posed and by whom they were posed.

Respondents' managers held unto themselves. I therefore do not find the unfair labor practice charge time-barred. 54

I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the amendment to the complaint by its nondisclosure and production of the strike replacement letter agreement

J. Replacement Worker Issues—Cases 7–CA–37783, 7–CA–38184, and 7–CA–38185 (complaint pars. 48 through 50)

1. The issue

The complaint alleges that Respondents have violated Section 8(a)(5) and (1) of the Act by unilaterally setting "terms and conditions of employment, including wages and benefits" for replacements of striking employees that were "different from those of the striking employees whom they have replaced."

Undisputed facts disclose that neither the News, Free Press or DNA did in fact bargain with the striking Unions over the wages, hours, terms and conditions of employment for replacement workers, nor did any of the Employers make contributions to any fringe benefit funds contained in the expired collective-bargaining agreements on their behalf.⁵⁵ Respondents contend that there is no legal obligation to do so.

2. Facts

At the outset of the July 13 strike, the DNA operated with supervisory employees and with loaned employees from other Gannett and Knight-Ridder facilities during that seasonably slow period. Other Knight-Ridder and Gannett newspapers were able to spare employees who were temporarily assigned to the DNA. About 4 weeks into the strike, the DNA began considering the use of permanent replacements, and 6 weeks after the strike commenced, the DNA began employing permanent replacements.

Business reasons, as testified to by Respondent's witnesses, for the need to hire replacement workers were not disputed. In July and August, the News and Free Press commenced hiring strike replacements for their respective units. The vast preponderance of replacement workers were paid at least equal to or, as in most cases, less than wage rates that were paid under the expired collective-bargaining agreements, and no contributions were made to any of the fringe benefit funds provided for under those expired agreements.

The General Counsel and the Union argue that documentary record evidence reveals that some editorial unit replacement workers, i.e., reporters, were paid at higher wage rates than the base contractual rate for their classifications. However, in view of the deprivation of fringe benefits from their total compensation package, and the fact that editorial unit employees in general actually received higher wages than the basic contract rate, I cannot conclude that any replacement editorial unit employees were compensated at a higher level than the strikers they replaced.

During negotiations that followed thereafter, no demand was made to bargain on behalf of the permanent replacements until August 21, 1996. On that date, McKnight wrote a letter to Jaske on behalf of the striking Unions, contending that new hires and replacement employees were bargaining unit employees and, as such, should be governed by the wages, hours, terms, and conditions of employment contained in the expired collectivebargaining agreement. McKnight contended that striking employees had job rights and seniority rights superior to those of new hires and replacements. Jaske responded on September 3, 1996, noting under current law there is an inherent conflict in a union attempting to represent striking and replacement employees at the same time. Jaske rejected McKnight's claim that strikers have superior job and seniority rights to replacements and new hires stating, "I know of no such authority, legal or contractual, for this position." On September 9, 1996, McKnight, while acknowledging there was "no point in exchanging correspondence regarding our respective views of federal labor law as it relates to replacement workers," nevertheless restated his prior position.

During negotiations, the Unions have taken the position that replacement workers should be displaced from active employment by returning strikers. That had become a major impediment in negotiations as late as July 29, 1996.⁵⁶

3. Analysis

In finding no distinction between replacements for strikers and replacements for lawfully locked-out employees, the Board succinctly set forth the state of law in *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279–1280 (1993):

It is now well settled that an employer permissibly may pay lesser benefits during a strike to lawfully hired strike replacements after the termination of a contract, even in the absence of a bargaining impasse. *Capitol-Husting Co.*, 252 NLRB 43, 45 (1980), enfd. 671 F.2d 237 (7th Cir. 1982); *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989). As the Board found in *Capitol-Husting*, supra, this is so for two reasons. First, as a practical matter, a union is not expected simultaneously to represent the interests of the replacements as it would the interests of the strikers. Second, the ability to set employment terms for replacements is a necessary incident of the right to hire them in the first instance.

We discern no meaningful reason why a union's relationship to newly hired temporary replacements in a lock-out situation, as here, should be considered stronger than a union's relation to newly hired replacements in a strike situation. In either instance, the union's representational role during the job action is directed toward the interests of the displaced employees, not toward their replacements. As a result, an employer's unilateral implementation of employment conditions for such replacements do not truly undermine a union's representational interests or authority.

Further, as noted, the unilateral implementation of employment terms for replacements is a necessary incident of an employer's right to hire temporary replacements during a lawful lockout. If the lockout itself is lawful and the

⁵⁴ It is also unnecessary to discuss the ongoing nature of the information request as a series of subsequent discrete requests and separate violations into the 10(b) period.

⁵⁵ The Respondent treated "crossover" or returning strikers, and those who never struck, differently. Those individuals received wage rates set out in the expired collective-bargaining agreements for their classification, worked under the conditions set out in the expired agreements and contributions were made to the fringe benefit funds contained in those expired agreements on their behalf.

⁵⁶ The uncontradicted testimony of Jaske refers to a demand for termination by Derey and others. The Union's brief, without record citation, denies that the Union demanded termination. Rather, it argues that it demands displacement of replacements to a preferential rehire status, if necessary, to reinstate returning strikers.

hiring of temporary replacements is lawful, there is no logical or practical reason to require that a bargaining impasse must exist before the employer may implement terms that are incidental to these more critical underlying, and lawful, acts. Accordingly, we shall dismiss the complaint.

In GHR Corp., ibid., the Board stated:

It is well settled that struck employers have no obligation to bargain about employment terms for replacements during the course of an economic strike.

It cited *Capitol-Husting*, ibid., and also *Imperial Outdoor Advertising*, 192 NLRB 1248, 1249 (1977), enfd. 470 F.2d 484 (8th Cir. 1992); and *Service Electric Co.*, 281 NLRB 633 (1986), in which the latter case, in turn, cited *Leveld Wholesale Co.*, 218 NLRB 1344, 1350 (1975), and numerous other cases in an exhaustive analysis of the evaluation of the state of law by the administrative law judge whose decision was adopted by the Board

The Unions and the General Counsel argue that the above precedent applied only to economic strikers, but that in any event it is bad law which should be reversed. They cite the late Board Member Browning's minority view disagreement with the above precedent in Harding Glass Co., 316 NLRB 985 fn. 5 (1995), enfd. in part and denied in part 80 F.3d 7 (1st Cir. 1996), and Chairman Gould's and Member Browning's observation in Chicago Tribune Co., 318 NLRB 920, 928 fn. 30 (1995), that they disagreed with the cited precedent "that employers have no obligation to bargain about the terms and conditions of employment for striker replacements during the course of an economic strike." In their view, economic strikers, replacements and non-strikers are all members of the bargaining unit for which the representative union is obliged to bargain in good faith, and all should be subject to the same principles "applied to govern the terms and conditions of all unit employees including replacement workers during an economic strike." Chicago Tribune Co., ibid. They made no reference to any distinction between economic strikes and unfair labor practice strikes. In the Harding case, the strike converted to an unfair labor practice strike after the implementation of different work conditions for replacements. The Chicago Tribune case involved an economic strike but the General Counsel did not allege that the employer violated the Act by failing to bargain about the terms and conditions of employment for striker replacements.

In *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), the Supreme Court endeavored to reconcile the *Service Electric* and *Leveld Wholesale* rationale, with the Board's position, of which it approved, that it will not presume that economic striker replacements oppose the representation of the striking union. The Court stated at page 492:

Moreover, even if the interests of strikers and replacements conflict during the strike, those interests may converge after the strike, once job rights have been resolved. Thus, while the strike continues, a replacement worker whose job appears relatively secure might well want the union to continue to represent the unit regardless of the union's bargaining posture during the strike. Surely replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union. ¹⁰ For these reasons, the Board's refusal to adopt

an antiunion presumption is not irreconcilable with its position in *Service Electric*, supra, and *Leveld Wholesale*, 218 N.L.R.B. 1344 (1975), regarding an employer's obligation to bargain with a striking union over replacements' employment terms.

¹⁰ Justice SCALIA appears to misunderstand our position. See post, at 1561 (dissenting opinion). We do not mean that the replacements' attitudes toward the union after the strike are relevant to the Board's determination. Rather, we mean only that during the strike a replacement may foresee that his interests favor representation by the union after the strike. Thus, even if he opposes the strike itself, he may nevertheless want the union to continue to represent the unit because of the benefits that will accrue to him from representation after the strike.

The Court's discussion of the potential for a striker replacement's desire for a striking union's representation after the strike is premised upon the existence of an economic strike. It did not discuss what potential might exist for an unfair labor practice striker replacement's attitude toward representation by a union seeking to displace that employee from active employment, if not termination.

The General Counsel and the Unions advance a variety of reasons based upon legal analysis and public policy considerations as to why Board precedent ought to be reversed. These must be presented to the Board. I can only apply existing Board law to the facts before me.

The General Counsel and Unions argue further, however, that the existing precedent does not apply to an unfair labor practice strike. They focus upon *Service Electric* as the seminal case, and upon which they perceive Respondents' defense to rest. That case is the only one to even suggest that an unfair labor practice strike would permit a different result. In footnote 10 at page 637, as cited by the General Counsel, the administrative law judge stated that there was no evidence that the strike was an unfair labor practice strike at inception or thereafter and said:

[I]t is not necessary to consider what qualifications, *if any*, would be imposed on the scope of that bargaining duty where replacements are hired for unfair labor practice strikers. Thus, that aspect of the problem is not addressed, save to the extent necessary to discern the Board's view on the scope of the struck employer's bargaining duty during the course of an economic strike [emphasis added].

The administrative law judge, however, dwelt upon two aspects he considered of "primary importance," i.e., "the ability to set employment terms for replacements is a necessary incident of the very right to hire them in the first place" and "the inability of a striking representative to bargain simultaneously in the best interest of both strikers and then replacements. . . ." He found that there were "two groups of employees whose employment interests continued to be diametrically opposed" because the economic strike replacements' continued employment was subject to displacements by strikers, which event he found particularly likely in the facts of his case. There, the parties had entered into a settlement agreement which provided, in addition to the normal risks of negotiated replacement, the strikers' "absolute right" to return to active employment, which right, of course, was akin to that of an unfair labor practice striker. Thus, unfair labor practice strikers' and replacements' self-perceived interests are even further opposed, particularly where, as here, the Unions have actively sought the displacement of replacements from active employment to accommodate the strikers' reinstatement. It would therefore place an extraordinary burden upon a striking representative to serve in a fiduciary relationship to different groups of employees with opposite interests. It would be unrealistic to expect that a striking representative would negotiate with an open mind receptive to agreement upon the terms of replacement employment to enable the employer to frustrate the strike and the interests of the striking employees. That pragmatic consideration is no less present in an unfair labor practice strike than it was in the Service Electric case, and its progeny, some of which explicitly apply their conclusions to economic strikes, and others that speak unqualifiedly despite the factual limitation of an economic strike at inception, e.g., Capitol-Husting Co., supra; Leveld Wholesale Co., supra. The Board's language in Goldsmith Motors, supra, was also unqualified. Moreover, in Imperial Outdoor Advertising, 192 NLRB 1248 (1971), enfd. in part 470 F.2d 484 (8th Cir. 1972), the Board found that the strike "was an unfair labor practice strike from its inception on June 1, 1970." Id. at 1249. Nonetheless, the Board concluded:

We believe contrary to the Trial Examiner, that Respondent was under no obligation to hire replacements at their wages in the contract and that it does not violate the Act by paying them lower wages. [Ibid.]

In *Harding Glass Co.*, supra, and in *Corson & Gruman*, 284 NLRB 316 (1987), enfd. 899 F.2d 47 (D.C. Cir. 1990), subsequent to unilateral implementation of replacements' terms of employment, the strike was converted to an unfair labor practice strike. In both cases, there was no qualifying language. In neither case did the Board limit the employer's right to determine conditions of employment of replacements to a period of time preceding the conversion to an unfair labor practice strike status, nor did the Board suggest that such bargaining obligation ensued thereafter.

The General Counsel and the Unions argue further that unfair labor practice strikes must be excepted because the strike was caused by the Respondent at least in part by his own unfair labor practice, and it therefore must not be able to profit by its own wrongdoing nor be permitted to withstand the strike by virtue of financial savings from lower-paid replacements. That argument shifts from a conceptual representation issue to one of punitive considerations or balancing of economic forces. While it is true that the strike was caused in large part by the unfair labor practices, the Respondent did not lock out the unit employees lawfully or unlawfully. They, in support of their Unions, chose to strike, in part to redress certain unfair labor practices. Other options were available. They were not physically forced to strike. They chose that option as a lawful exercise of their rights. However, as the judge in Service Electric noted, balancing bargaining power is not a proper consideration for the Board, supra at 639, citing NLRB v. Insurance Agents Union, 361 U.S. 477, 497 (1960).

Furthermore, the record evidence discloses a multitude of economic causal factors for the strike, and there is no basis upon which to conclude definitively that a strike would not have occurred absent the unfair labor practices. Finally, there is no allegation that the Respondents engaged in a general course of bad-faith bargaining. In fact, bargaining resumed and continued after the strike.

The last consideration is that Respondents must be punished for their misconduct which in part caused the strike. The Respondents, as the Board precedent states, had a right to hire replacements for legitimate business reasons, which may not be abrogated or limited. That right is not lost when a strike starts as, or converts to unfair labor practice status. That status confers different rights upon the strikers and limits the employment term of replacements. However, I find no precedent and nothing in the Board's analyses in that precedent cited to support the finding that a struck employer's hiring of replacements be limited to the extent that was found so unacceptable in that precedent simply because the strike in part or even in large part was caused by unfair labor practices. Such a finding constitutes so radical a departure from the concept of an employer's right to hire replacements for legitimate business reasons, even in an unfair labor practice strike, that it requires a clear-cut statement of policy from the Board. Absent such statement, I cannot find these complaint allegations to set forth a meritorious violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

- 1. As found above, Respondents, The Detroit News, Inc., The Free Press, Inc., and Detroit Newspapers are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and each of the Charging Unions is a labor organization within the meaning of the Act and under Section 9(a) of the Act, the exclusive bargaining representatives for their respective units which are appropriate for collective bargaining within the meaning of Section 9(b) of the Act, and are described in their respective bargaining agreements, the most recent of which expired on April 30, 1995.
- 2. Respondents have violated Section 8(a)(5) and (1) of the Act, as found in the above decision, which constitutes unfair labor practices which interfere with commerce within the meaning of the Act.
- 3. The strike which commenced on July 13, 1996, was an unfair labor practice strike at its inception and was prolonged by subsequent unlawful threat to permanently replace unfair labor practice strikers.

THE REMEDY

Having found that Respondents violated Section 8(a)(5) and (1) of the Act as alleged in certain paragraphs of the complaint, I recommend that they be ordered to cease and desist from the unlawful conduct and take certain affirmative action to effectuate the policies of the Act as set forth in the recommended Order. Specifically, inasmuch as I have found that Respondent News had unlawfully on July 6, 1995, implemented its merit pay plan bargaining proposal and its bargaining proposal concerning the right to assign employees represented by the Guild to make television appearances without additional compensation, I recommend that Respondent News be ordered to rescind those changes in working conditions, including any wage increases if the Guild so requests, and return to the status quo ante in those matters and make whole those employees who suffered financial loss due to the unilateral changes, to be computed in accordance with Ogle Protection Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1978).

[Recommended Order omitted from publication.]